



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



3 2044 078 664 364

HARVARD LIBRARY

xy
Jly 31

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF WASHINGTON.

CONTAINING
DECISIONS RENDERED FROM FEBRUARY 23 TO SEPTEMBER 17,
1898, INCLUSIVE.

EUGENE G. KREIDER,
REPORTER.

VOLUME XIX.

BANCROFT-WHITNEY CO.,
LAW PUBLISHERS AND LAW BOOK SELLERS,
SEATTLE AND SAN FRANCISCO,
1899.

Rec. Apr. 7, 1899.

PRINTED, STEREOTYPED AND BOUND
BY
THE CALVERT COMPANY,
SEATTLE, WASH.

**JUDGES OF THE SUPREME COURT OF THE
STATE OF WASHINGTON.**

HON. ELMON SCOTT, CHIEF JUSTICE.

HON. THOMAS J. ANDERS, JUDGE.

HON. RALPH O. DUNBAR, JUDGE.

HON. MERRITT J. GORDON, JUDGE.

HON. JAMES BRADLY REAVIS, JUDGE.

C. S. REINHART, *Clerk.*

PATRICK HENRY WINSTON, *Attorney-General.*

THOMAS M. VANCE, *Ass't. Attorney-General.*

JUDGES OF THE SUPERIOR COURTS OF THE STATE OF WASHINGTON.

COUNTIES.	JUDGES.
Spokane and Stevens,	Hon. WILLIAM E. RICHARDSON.
Spokane,	Hon. LEANDER H. PRATHER.
Whitman,	Hon. WILLIAM McDONALD.
Lincoln, Okanogan, Douglas and Adams	Hon. CHARLES H. NEAL.
Walla Walla,	Hon. THOMAS H. BRENTS.
Columbia, Garfield and Asotin, .	Hon. MELVIN M. GODMAN.
Kittitas, Yakima and Franklin, .	Hon. JOHN B. DAVIDSON.
Clarke, Skamania, Cowlitz and Klickitat,	Hon. ABRAHAM L. MILLER.
Lewis, Pacific and Wahkiakum,	Hon. HENRY S. ELLIOTT.
Mason and Chehalis,	Hon. CHARLES W. HODGDON.
Thurston,	{ Hon. CHARLES H. AYER.* Hon. BYRON MILLETT.†
Pierce,	{ Hon. JAMES A. WILLIAMSON. Hon. THOMAS CARROLL. Hon. WILLIAM H. H. KEAN.
King,	{ Hon. ORANGE JACOBS. Hon. WM. HICKMAN MOORE. Hon. E. D. BENSON.
Clallam, Jefferson and Island, .	Hon. JAMES G. MCCLINTON.
Skagit and San Juan,	Hon. JESSE P. HOUSER.
Kitsap and Snohomish,	Hon. FRANK T. REID.
Whatcom	Hon. HIRAM E. HADLEY.

* Died March 9, 1898.

† Appointed March 17, 1898, by Governor to fill vacancy.

TABLE OF CASES REPORTED.

Aberdeen, Wilson v.	89
Adams v. Ames.	425
Adams County v. Dobschlag.	356
Ames, Adams v.	425
Anderson v. Inland Telephone and Telegraph Company.	575
Anderson v. Northern Pacific Railway Co.	340
Armstrong, State v.	706
Averill, Bishop v.	490
Backus, Colby v.	347
Bacon v. Tacoma.	674
Ball, Pickering v.	185
Ballard, Rowe v.	I
Ballard, White v.	284
Barbee, <i>In re</i>	306
Baum v. Whatcom County.	626
Bay View Brewing Co. v. Tecklenberg.	469
Bettman v. Cowley.	207
Bettman v. Cowley.	707
Bidwell v. Rice.	146
Bingham v. Keylor.	555
Birmingham v. Cheetham.	657
Bishop v. Averill.	490
Bishop, Lewis v.	312
Blackburn v. Washington Gold Mining Co.	361
Blair v. Cassin.	127
Board v. First Presbyterian Church.	455
Board of Education, State, <i>ex rel.</i> Barnard v.	8
Bogue v. Seattle.	396
Bohn, State v.	36
Bridges, State, <i>ex rel.</i> Denny v.	44
Bridges, State, <i>ex rel.</i> Improvement Co. v.	431
Bridges, State, <i>ex rel.</i> Land Co. v.	428
Bringgold v. Spokane.	333
Brown, State, <i>ex rel.</i> Witherop v.	383
Buckley, Conklin v.	262
Burns, State v.	52
Busby, Norfor v.	450
Butler State v.	110

Cardin, Vermont Loan & Trust Co. v.	304
Carlson v. Wilkeson Coal and Coke Co.	473
Carlson Bros. & Co. v. Van de Vanter.	32
Carpenter, Plant v.	621
Carpenter, State, <i>ex rel.</i> Twiss v.	378
Carroll v. Pacific National Bank.	639
Carstens v. Gustin.	403
Carter v. Seattle.	597
Casey v. Malidore.	279
Cassin, Blair v.	127
Cheetham, Birmingham v.	657
Cheetham, State, <i>ex rel.</i> Howlett.	330
Chezum v. Parker.	645
Chin Let, Seattle v.	38
Clallam County, Landes Estate Co. v.	569
Colby v. Backus.	347
Coleman v. Montgomery.	610
Conklin v. Buckley.	262
Cowley, Bettman v.	207
Cowley, Bettman v.	707
Creagh v. Equitable Life Ass. Society.	108
Davis v. Seattle National Bank.	65
Decker, Gordon v.	188
Denny v. Northern Pacific Railway Co.	298
De Rackin v. Lincoln County.	360
Dibble, Lynde v.	328
Dickey v. Northern Pacific Railway Co.	350
Ditmar, State, <i>ex rel.</i> Ditmar v.	324
Dobschlag, Adams County, v.	356
Dorsey, State, <i>ex rel.</i> Dunn v.	120
Eldridge v. Stenger.	697
Equitable Life Ass. Society, Creagh v.	108
Erving, State v.	435
Estabrook, Morse v.	92
Exchange National Bank, Munson v.	125
Faulkner v. Seattle.	320
Franklin Savings Bank v. Moran.	200
First Presbyterian Church, Board v.	455
First National Bank v. Root.	111
Fisher v. Kittinger.	706
Gibbon v. Kerry.	159
Gibson v. Kerry.	159
Gifford, State v.	464
Glover, Loewenberg v.	544
Gordon v. Decker.	188

CASES REPORTED.

vii

Gottstein v. Wist.	708
Graham v. Spokane.	447
Gray's Harbor Boom Co. Winters v.	346
Greer, Vermont Loan & Trust Co.. v.	611
Gregory v. Loose.	599
Griffith v. Maxwell.	614
Griffith v. Strand.	686
Gustason, Kroenert v.	373
Gustin, Carstens v.	403
Hallam v. Tillinghast.	20
Hammarberg v. St. Paul and Tacoma Lumber Co.	537
Hart v. Pratt.	560
Headlee, State <i>ex rel.</i> Porter v.	477
Hemrich v. Wist.	516
Heron, State v.	706
Hoshor v. Kautz.	258
Hudson Land Co., State, <i>ex rel.</i> Winston v.	85
Hull v. Stephenson.	572
Hull, W. P. Fuller & Co. v.	400
Inland Telephone and Telegraph Company, Anderson v.	575
<i>In re</i> Barbee.	306
James v. Prosch.	707
Jenkins v. Powe.	113
Johnny Tommy, State v.	270
Johnson, State v.	410
Johnston, Kroenert v.	96
Johnston v. Wood.	441
Jones v. Seattle.	669
Kautz, Hoshor v.	258
Kelly, Nye v.	73
Kent Lumber Co. Shepich v.	296
Kerry, Gibson v.	159
Kerry, Seattle Trust Co. v.	389
Keylor, Bingham v.	555
Kiggins v. Munday.	233
Kirkman, Moore v.	605
Kittinger, Fisher v.	706
Klein, State v.	368
Kroenert v. Gustason.	373
Kroenert v. Johnston.	96
Landes Estate Co. v. Clallam County.	569
Lattin, State v.	57
Lee v. Lee.	355
Lee, Ver Planck v.	492

Lewis v. Bishop.	312
Lewis v. McDougall.	388
Lidgerwood Park Water Works Co. v. Spokane.	365
Liebes, State, <i>ex rel.</i> Bartelt v.	589
Lincoln County, De Rackin v.	360
Loewenberg v. Glover.	544
Loose, Gregory v.	599
Lynde v. Dibble.	328
McCue, Thomas v.	287
McDougall, Lewis v.	388
McDougall v. Walling.	80
Malidore, Casey v.	279
Manhattan Trust Co. v. Seattle Coal & Iron Co.	493
Mason, State v.	94
Maxwell, Griffith v.	614
Merrill, Pierce Co. v.	175
Millett, Young v.	486
Milroy, Waldo v.	156
Montgomery, Coleman v.	610
Moore v. Kirkman.	605
Moran, Franklin Savings Bank v.	200
Moran Bros. Co. v. Northern Pacific R. R. Co.	266
Morse v. Estabrook.	92
Munday, Kiggins v.	233
Munson v. Exchange National Bank.	125
Neal, State <i>ex rel.</i> Clark v.	642
New Whatcom, Philadelphia, etc., Trust Co. v.	225
Noble v. Seattle.	133
Norfor v. Busby.	450
Northern Pacific R. R. Co., Moran Bros. Co. v.	266
Northern Pacific Ry. Co., Anderson v.	340
Northern Pacific Ry. Co., Denny v.	298
Northern Pacific Ry. Co., Dickey v.	350
Northern Pacific Ry. Co., Ryan v.	533
Northwest, etc., Ins. Co., Prussian Ins. Co. v.	281
Nye v. Kelly.	73
O. K. Gold Mining Co., Old National Bank v.	194
Old National Bank v. Mining Co.	194
Olympia, West Philadelphia Title & Trust Co. v.	150
Pacific National Bank, Carroll v.	639
Parker, Chezum v.	645
Parker, Snyder v.	276
Partridge, Washington Dredging, etc., Co.	62
Philadelphia, etc., Trust Co. v. New Whatcom.	225
Pickering v. Ball.	185

Pierce County v. Merrill	175
Pierce County <i>ex rel.</i> Maloney v. Spike	652
Plant v. Carpenter	621
Port Townsend, Townsend Gas and Electric Co. v.	407
Powe, Jenkins v.	113
Prather, State, <i>ex rel.</i> Loan Society v.	336
Pratt, Hart v.	560
Prescott, Spokane County v.	418
Price, Townsend v.	415
Prosch, James v.	707
Prussian Ins. Co. v. Northwest, etc., Ins. Co.	281
Queen City Printing Co., Van Brocklin v.	552
Rauh v. Scholl	30
Rhode Island Mortgage and Trust Company v. Spokane	616
Rice, Bidwell v.	146
Roberts v. Washington Water Power Co.	392
Rogers v. Turner	399
Root, First National Bank v.	111
Rowe v. Ballard	I
Ryan v. Northern Pacific Railway Co.	533
St. Paul and Tacoma Lumber Co., Hammarberg v.	537
Savage v. Sternberg	679
Scholl, Rauh v.	30
Seattle, Bogue v.	396
Seattle, Carter v.	597
Seattle v. Chin Let.	38
Seattle, Faulkner v.	320
Seattle, Jones v.	669
Seattle, Noble v.	133
Seattle Coal & Iron Co., Manhattan Trust Co. v.	493
Seattle L. S. & E. Ry. Co. v. Simpson	628
Seattle National Bank, Davis v.	65
Seattle Trust Co. v. Kerry	389
Selber v. Springbrook Trout Farm	49
Shepich v. Kent Lumber Co.	296
Simpson, Seattle L. S. & E. Ry. Co. v.	628
Smith, State v.	376
Smith, State, <i>ex rel.</i> Young v.	644
Snyder v. Parker	276
Spike, Pierce County <i>ex rel.</i> Maloney v.	652
Spokane, Bringgold v.	333
Spokane, Graham v.	447
Spokane, Lidgerwood Park Water Works Co. v.	365
Spokane, Rhode Island Mortgage and Trust Co. v.	616
Spokane & Eastern Trust Co. v. Young	122

Spokane County v. Prescott	418
Spokane St. Ry. Co., State, <i>ex rel.</i> Grimsfelder v.	518
Sprague Lumber Co., Washington Mill Co. v.	165
Springbrook Trout Farm, Selber v.	49
State v. Arnstrong.	706
State v. Bohn.	36
State v. Burns.	52
State v. Butler.	110
State v. Erving	435
State v. Gifford	464
State v. Heron.	706
State v. Johnny Tommy.	270
State v. Johnson.	410
State v. Klein.	368
State v. Lattin.	57
State v. Mason.	94
State v. Smith.	376
State v. Tugwell	238
State, Young v.	634
State, <i>ex rel.</i> Barnard v. Board of Education.	8
State, <i>ex rel.</i> Bartelt v. Liebes.	589
State, <i>ex rel.</i> Bellingham Bay Imp. Co. v. Bridges.	431
State, <i>ex rel.</i> Boyle v. Superior Court.	128
State, <i>ex rel.</i> Clark v. Neal.	642
State, <i>ex rel.</i> Denny v. Bridges.	44
State, <i>ex rel.</i> Ditmar v. Ditmar.	324
State, <i>ex rel.</i> Dunn v. Dorsey.	120
State, <i>ex rel.</i> Gatzert & SchwabacherL and Co. v. Bridges.	428
State, <i>ex rel.</i> German Savings & Loan Society v. Prather.	336
State, <i>ex rel.</i> Grinsfelder v. Street Ry. Co.	518
State, <i>ex rel.</i> Holgate v. Superior Court.	114
State, <i>ex rel.</i> Howlett v. Cheetham.	330
State, <i>ex rel.</i> Maylor v. Superior Court.	198
State, <i>ex rel.</i> Porter v. Headlee.	477
State, <i>ex rel.</i> Sligh v. Superior Court.	118
State, <i>ex rel.</i> Twiss v. Carpenter.	378
State, <i>ex rel.</i> Winston v. Hudson Land Co.	85
State, <i>ex rel.</i> Witherop v. Brown.	383
State, <i>ex rel.</i> Young v. Smith.	644
Stenger, Eldridge v.	697
Stephenson, Hull v.	572
Sternberg, Savage v.	679
Stewart, Wright v.	179
Strand, Griffith v.	686
Superior Court, State, <i>ex rel.</i> Boyle v.	128
Superior Court, State, <i>ex rel.</i> Holgate v.	114

Superior Court, State, <i>ex rel.</i> Maylor v.....	198
Superior Court, State, <i>ex rel.</i> Sligh v.....	118
Tacoma, Bacon v.....	674
Tacoma Land Co., Tullis v.....	140
Tecklenberg, Bay View Brewing Co. v.	469
Thomas v. McCue.....	287
Tillinghast, Hallam v.....	20
Townsend v. Price.....	415
Townsend Gas & Electric Co. v. Port Townsend...	407
Tugwell, State v.....	238
Tullis v. Tacoma Land Co.....	140
Turner, Rogers v.....	399
Van Brocklin v. Queen City Printing Co.....	552
Van De Vanter, Carlson Bros. & Co. v.....	32
Vermont Loan & Trust Co. v. Cardin.....	304
Vermont Loan & Trust Co. v. Greer.....	611
Ver Planck v. Lee.....	492
Von Schrader v. Welcher.....	349
Waldo v. Milroy.....	156
Walling, McDougall v.....	80
Washington Dredging, etc., Co. v. Partridge.....	62
Washington Gold Mining Co., Blackburn v.....	361
Washington Mill Co. v. Sprague Lumber Co.....	165
Washington Water Power Co., Roberts v.....	392
Welcher, Von Schrader v.....	349
West Philadelphia Title & Trust Co. v. Olympia.....	150
Whatcom County, Baum v.....	626
White v. Ballard.....	284
Wilkeson Coal and Coke Co., Carlson v.....	473
Wilson v. Aberdeen.....	89
Winters v. Gray's Harbor Boom Co.....	346
Wist, Gottstein v.....	708
Wist, Hemrich v.....	516
Wood, Johnston v.....	441
W. P. Fuller & Co. v. Hull.....	400
Wright v. Stewart.....	179
Young v. Millett.....	486
Young, Spokane & Eastern Trust Co. v.....	122
Young v. State.....	634

TABLE OF CASES CITED.

Abernethy v. Town of Medical Lake, 9 Wash. 112.....	224, 677
Adamant Mfg. Co. v. Wallace, 16 Wash. 614.....	103, 513
Adams v. Chicago, M. & St. P. Ry. Co., 93 Iowa, 565.....	598
Adams v. Clark, 9 Cush. 215.....	268
Akin v. Jones, 93 Tenn. 353.....	27
Albion v. Hetrick, 90 Ind. 545.....	6
Alexander v. Relfe, 74 Mo. 495.....	171
Allen v. Olympia Light & Power Co., 13 Wash. 307.....	72
Allen v. Reilly, 5 Nev. 452.....	15
Allen v. State, 6 Kan. App. 915.....	422
Amer v. Hightower, 70 Cal. 440.....	694
American Asphalt Co. v. Gribble, 8 Wash. 255.....	375
American Investment Co. v. Farrar, 87 Iowa, 437.....	454
Ames v. Bigelow, 15 Wash. 532.....	614
Amory v. Kannoofsky, 117 Mass. 351.....	565
Anderson v. Dunn, 6 Wheat. 204.....	252
Andrews v. Andrews, 69 Ill. 609.....	226
Andrews v. Knox County, 70 Ill. 65.....	683
Angier v. Brewster, 69 Ga. 362.....	694
Anheuser-Busch Brewing Ass'n. v. Clayton, 56 Fed. 753.....	27
Askam v. King County, 9 Wash. 1.....	204
Atchison, T. & S. F. R. R. Co. v. Shaft, 19 Am. & Eng. R. R. Cases, 529.....	536
Atrops v. Costello, 8 Wash. 149.....	135
Attorney General v. Boston, 123 Mass. 460.....	524
Austin v. Wilson, 11 N. Y. Supp. 565.....	72
Bacon v. Tacoma, 19 Wash. 674.....	685
Baker v. Bryan, 64 Iowa, 561.....	593
Baker v. Johnson County, 33 Iowa, 151.....	425
Baker v. Pratt, 15 Ill. 568.....	565
Baker v. Prewett, 3 Wash. T. 474.....	619
Bank of Augusta v. Earle, 13 Pet. 587.....	173
Bank of Commerce v. Russell, 2 Dill. 215.....	27
Bardsley v. Sternberg, 17 Wash. 473.....	676
Barnett v. Ashmore, 5 Wash. 163.....	19
Barnitz v. Beverly, 163 U. S. 118.....	214
Bates v. Courtwright, 36 Ill. 518.....	649
Beach v. Fulton Bank, 3 Wend. 583.....	173
Bedford v. Terhune, 30 N. Y. 453.....	665
Bedford Belt Ry. Co. v. Brown, 142 Ind. 659.....	585
Bell v. Roberts, 13 Vt. 582.....	224
Belleville v. Citizens Horse Ry. Co., 152 Ill. 171.....	632
Belmont County Branch Bank v. Price, 8 Ohio St. 299.....	462
Benjamin v. Elmira, etc., R. R. Co., 49 Barb. 448.....	624
Bergin v. Telephone Co., 70 Conn. 54.....	582
Bettman v. Cowley, 19 Wash. 207.....	707
Biggs v. McBride, 17 Ore. 640.....	330
Bishop v. Averill, 17 Wash. 209.....	490
Blake v. People, 80 Ill. 11.....	326
Blake v. State Savings Bank, 12 Wash. 619.....	25

Board of Com'rs v. First National Bank, 48 Kan. 561.....	178
Bonds v. Hickman, 29 Cal. 461.....	633
Bowman v. Davis, 13 Colo. 297.....	649
Bowman v. First National Bank, 9 Wash. 614.....	24
Boyd v. Burrell, 60 Cal. 280.....	633
Bradley Fertilizer Co. v. South Pub. Co., 17 N. Y. Supp. 587.....	72
Breen v. Kelly, 45 Minn. 352.....	593
Brennan v. State, 25 Ind. 403.....	413
Bronson v. Kinsie, 1 How. 311.....	214
Brown v. Carkeek, 14 Wash. 443.....	144
Bruce v. Foley, 18 Wash. 96.....	302
Brumback v. Weinstein, 37 Mo. App. 520.....	557
Buck v. Bransford, 58 Ark. 289.....	557
Bushby v. New York, L. I. & W. R. R. Co., 107 N. Y. 374.....	583
Campbell v. Brown, 64 Iowa, 425.....	127
Campbell v. Holt, 115 U. S. 620.....	224
Carey v. Chicago, M. & St. P. Ry. Co., 61 Wis. 71.....	354
Carle v. Wall, 16 S. W. 293.....	305
Carr v. West End St. Ry. Co., 163 Mass. 360.....	598
Carroll v. Centralia Water Co. 5 Wash. 613.....	4
Cassatt v. Board of County Com'rs, 39 Kan. 505.....	384
Chapman v. Stoneman, 63 Cal. 490.....	15
Chicago, etc., R. R. Co. v. Packwood, 59 Miss. 280.....	353
Chipman v. Morrill, 20 Cal. 137.....	420
Christensen v. Eno, 106 N. Y. 97.....	102
Christensen v. Quintard, 8 N. Y. Supp. 400.....	102
Christofferson v. Pfennig, 16 Wash. 491.....	131
City of Davenport v. Rice, 75 Iowa, 74.....	42
City of Des Moines v. Hall, 24 Iowa, 234.....	532
City of Janesville v. Janesville Water Co., 89 Wis. 159.....	11
City of Junction City v. Blades, 1 Kan. App. 85.....	598
City of Manketo v. Arnold, 36 Minn. 62.....	42
City of St. Louis v. Vert, 64 Mo. 206.....	42
City of Spokane v. First National Bank, 68 Fed. 982.....	27
Clews v. Lee County, 2 Woods. 474.....	684
Cline v. Seattle, 13 Wash. 444.....	203
Clowd v. Town of Sumas, 9 Wash. 399.....	677
Clough v. Spokane, 7 Wash. 279.....	592
Cogswell v. Hogan, 1 Wash. 4.....	634
Collins v. Hall, 5 Wash. 366.....	144
Comben v. Belleville Stone Co., 59 N. J. Law, 220.....	587
Comegys v. American Lumber Co., 8 Wash. 661.....	604
Commercial Electric Light & Power Co. v. Tacoma, 17 Wash. 661.....	532
Commissioners v. VanSlyck, 52 Kan. 622.....	422
Commonwealth v. Daudridge, 2 Va. Cas. 414.....	255
Commonwealth v. Horregau, 127 Mass. 450.....	310
Connecticut Mut. Life Ins. Co. v. Cushman, 108 U. S. 51.....	221
Cooper v. Mullins, 30 Ga. 146.....	541
Cooper v. People, 13 Colo. 337.....	255
Corbitt v. Harrington, 14 Wash. 107.....	72
Couper v. Shirley, 75 Fed. 168.....	453
Curry v. Allen, 55 Iowa, 318.....	557
Curtis v. Leavitt, 15 N. Y. 9.....	171
Curtis v. Ward, 20 Conn. 204.....	649
Curtis v. Whitney, 13 Wall. 68.....	223
Darst v. People, 62 Ill. 306.....	683
Dartmouth College v. Woodward, 4 Wheat. 518.....	173

Davis v. Clark, 49 Pac. 667.....	422
Davis v. Menasha, 20 Wis. 194.....	28
Dawes v. Shed, 15 Mass. 6.....	422
Day v. Cleveland, C. C. & St. L. Ry. Co., 137 Ind. 206.....	585
DePeyster v. Michael, 6 N. Y. 467.....	460
Dillon v. Whatcom County, 12 Wash. 391.....	479
Distler v. Dabney, 7 Wash. 431.....	292
Dixon v. Western Union Tel. Co., 68 Fed. 630.....	583
Drury v. Henderson, 143 Ill. 315.....	222
Dunham v. State, 6 Iowa, 245.....	244
Drufee v. Abbott, 50 Mich. 278, 50 Mich. 479.....	608
Durhem v. Wilmington & W. R. R. Co., 82 N. C. 352.....	353
El Paso National Bank v. Fuchs, 89 Tex. 197.....	557
Exchange National Bank v. Wolverton, 11 Wash. 108.....	613
<i>Ex parte</i> Bergman, 3 Wyo. 395.....	252
<i>Ex parte</i> Bollman, 4 Cranch, 75.....	252
<i>Ex parte</i> Fisk, 113 U. S. 713.....	683
<i>Ex parte</i> Fleming, 4 Hill, 581.....	681
<i>Ex parte</i> Kearney, 7 Wheat. 38.....	252
Fahey v. Crotty, 63 Mich. 383.....	598
Fairfield v. Binnian, 13 Wash. 1.....	110
Falk v. Strother, 84 Cal. 544.....	677
Falconer v. Warner, 2 Wash. 525.....	21
Fawcett v. Superior Court, 15 Wash. 342.....	12
Fetrow v. Merriwether, 53 Ill. 275.....	462
Fletcher v. Holmes, 25 Ind. 458.....	402
Flood v. Western Union Tel. Co., 131 N. Y. 603.....	581
Ft. Wayne, etc., R. R. Co. v. Woodward, 112 Ind. 118.....	354
Franklin v. Reiner, 6 Cal. 340.....	633
Frederick v. Seattle, 13 Wash. 428.....	203
Freeland v. Williams, 131 U. S. 405.....	221
Freeman v. Ambrose, 12 Wash. 1.....	198
Frelinghuysen v. Nugent, 36 Fed. 229.....	27
Frey v. Michie, 68 Mich. 323.....	330
Froelich v. Morse, 15 Wash. 636.....	166
Gaffney v. McGrath, 11 Wash. 456.....	569
Galbraith v. Green, 13 Serg. & R. 85.....	28
Galland v. Galland, 44 Cal. 475.....	247
Garrison v. City of New York, 21 Wall. 196.....	220
Gates v. Boston, etc., R. R. Co., 53 Conn. 333.....	527
German-American Savings Bank v. Spokane, 17 Wash. 315.....	90, 232, 620
Gibbons v. United States, 8 Wall. 269.....	636
Gibbs v. Green, 54 Miss. 592.....	668
Gillet v. Moody, 3 N. Y. 479.....	171
Gittings v. Stearns, 19 Ill. 376.....	224
Goble v. Howard, 12 Ohio St. 165.....	557
Goetzinger v. Rosenfeld, 16 Wash. 392.....	620
Gould v. Evansville, etc., R. R. Co., 91 U. S. 526.....	614
Graham v. Conrad, 66 Minn. 471.....	633
Graham v. Culver, 3 Wyo. 639.....	626
Graves v. Horton, 38 Minn. 66.....	603
Griffin v. Mixon, 38 Miss. 424.....	316
Griffin v. Ohio & M. Ry. Co., 124 Ind. 326.....	584
Grymes v. Sanders, 93 U. S. 55.....	293
Gulf, C. & S. F. Ry. Co. v. Gross, 21 S. W. 186.....	598
Gumbel v. Pitkin, 113 U. S. 545.....	624
Gunderson v. Cochran, 3 Wash. 476.....	22
Guy v. Ide, 6 Cal. 99.....	454

Hagar v. Reclamation District, 111 U. S. 701.....	316
Hale v. Haselton, 21 Wis. 325.....	28
Hall & Paulson Furniture Co. v. Wilbur, 4 Wash. 644.....	144. 569
Hallam v. Tillinghast, 19 Wash. 20.....	31
Hallock v. Jaudin, 34 Cal. 167.....	618
Hamar v. Peterson, 9 Wash. 152.....	64
Hansen v. Morris, 87 Iowa, 303.....	557
Happy v. Mosher, 48 N. Y. 313.....	339
Hardin v. Hardin, 34 S. C. 77.....	454
Harmon v. Ashmead, 60 Cal. 441.....	619
Hastings v. Halleck, 10 Cal. 31.....	633
Haugen v. Albina Light & Water Co., 21 Ore. 411.....	529
Hays v. Merchants' Bank, 10 Wash. 573.....	462
Hays v. Miller, 1 Wash. T. 143.....	402
Hayward v. Bank, 96 U. S. 611.....	293
Haywood v. Miller, 14 Wash. 660.....	613
Hazeltine v. Granger, 44 Mich. 503.....	454
Healy v. O'Brien, 66 Cal. 517.....	278
Hefner v. Northwestern Mut. Life Ins. Co., 123 U. S. 747.....	626
Hemrich v. Wist, 19 Wash. 516.....	708
Henderson's Adm'r v. Kentucky Central R. R. Co., 86 Ky. 389.....	135
Henning's Adm'r v. Louisville Leather Co., 12 S. W. 550.....	136
Hice v. Orr, 16 Wash. 163.....	330
Bill v. Finnigan, 54 Cal. 493.....	11
Hogan v. Kyle, 7 Wash. 595.....	293
Holtt v. Holcomb, 23 N. H. 535.....	694
Holland v. Fox, 3 Bl. & Bl. 977.....	257
Home Fire Ins. Co. v. Dutcher, 48 Neb. 755.....	11
Howard v. Shaw, 10 Wash. 151.....	110
Hughes v. Davis, 40 Cal. 117.....	278
Humphreys v. Mathews, 11 Ill. 471.....	557
Hurley v. Watson, 68 Mich. 531.....	603
Illinois Central R. R. Co. v. Borders, 61 Ill. App. 55.....	598
Illinois Trust & Sav. Bank v. First National Bank, 15 Fed. 858.....	27
<i>In re</i> Ayers, 123 U. S. 443.....	683
<i>In re</i> Boyd, 34 Kan. 570.....	349
<i>In re</i> Ebenhack, 17 Kan. 618.....	348
<i>In re</i> Hughes, 43 Pac. 692.....	255
<i>In re</i> Lybarger, 2 Wash. 131.....	308
<i>In re</i> Rafferty, 1 Wash. 382.....	308
<i>In re</i> Ryers, 72 N. Y. 1.....	16
<i>In re</i> Sawyer, 124 U. S. 200.....	683
<i>In re</i> Waite, 99 N. Y. 433.....	127
<i>In re</i> Wheeler, 34 Kan. 96.....	349
Ireland v. Hunnell, 90 Iowa, 98.....	677
Isham v. Greenham, 1 Handy, 357.....	268
Jackson v. Lamphire, 3 Pri. 280.....	223
Jaeger v. Kelley, 52 N. Y. 274.....	651
Jenkins v. Columbia Land & Imp. Co., 13 Wash. 502.....	268
Johnson v. Higgins, 53 Conn. 236.....	28
Johnson v. Superior Court, 63 Cal. 578.....	248
Johnston v. San Francisco Savings Union, 75 Cal. 134.....	624
Jolliffe v. Brown, 14 Wash. 155.....	354
Jones v. Morgan, 67 Cal. 308.....	677
Jordan's Adm'r v. Cincinnati, N. O. & T. P. Ry. Co., 89 Ky. 40.....	136
Julian v. State, 122 Ind. 77.....	637
Julian v. State, 140 Ind. 581.....	639

Kelley v. Pierce County, 15 Wash. 697.....	449
Kelly v. Edwards, 69 Cal. 460.....	330
Kennedy v. People, 9 Colo. App. 490.....	42
Kenton County v. Lowe, 91 Ky. 367.....	423
Kizer v. Caufield, 17 Wash. 417.....	131
Kuapp v. Crawford, 16 Wash. 524.....	64
Kuapp v. Swaney, 56 Mich. 345.....	593
Kroenert v. Johnston, 19 Wash. 96.....	497, 510, 514
Lamb v. Railroad Co., 39 Iowa, 333.....	683
Lamont v. Cheshire, 65 N. Y. 30.....	705
Langford v. United States, 101 U. S. 341.....	636
Lanier v. Irvine, 24 Minn. 116.....	424
Larsson v. McClure, 95 Wis. 533.....	585
Lawry v. County Commissioners, 12 Wash. 446.....	573
Lee v. Kingsbury, 13 Tex. 68.....	625
Levy v. Goldberg, 40 Wis. 308.....	12
Lewis v. Colgan, 115 Cal. 529.....	636
Litchfield v. McDonald, 35 Minn. 167.....	425
Little v. Chadwick, 151 Mass. 109.....	27
Loader v. Brooklyn Heights R. R. Co., 35 N. Y. Supp. 996.....	525
Long v. Eisenbeis, 18 Wash. 423.....	156
Louisiana v. Mayor, 109 U. S. 285.....	210, 221
Louisiana v. New Orleans, 102 U. S. 203.....	216
Louisiana v. Plisbury, 105 U. S. 278.....	212
Louisville & N. R. L. Co. v. Coppage, 13 S. W. 1086.....	136
Louisville & N. R. R. Co. v. Wainscott, 3 Bush, 149.....	353
Lowe v. Kansas, 163 U. S. 81.....	348
Lucas v. White Line Transfer Co., 59 Am. Rep. 449.....	173
Lumpkin v. Smith, 62 Tex. 251.....	608
Lyman v. City of Lincoln, 38 Neb. 794.....	593
McAlpin v. Cassidy, 17 Tex. 449.....	603
McArthur v. Lane, 15 Me. 245.....	305
McCauley v. Weller, 12 Cal. 500.....	14
McCracken v. Hayward, 2 How. 608.....	214
McDonald v. Great Northern R. R. Co., 46 Pac. 766.....	354
McDougall v. Walling, 15 Wash. 78.....	82
McElwain v. Huston, 1 Wash. 359.....	197
McIntee v. State, 24 Wis. 43.....	413
McGorty v. Southern N. E. Tel. Co., 69 Conn. 635.....	582
Mackay v. St. Mary's Church, 15 R. I. 121.....	127
McKenzie v. Woodin, 9 Wash. 414.....	144
McLean v. Clapp, 141 U. S. 429.....	293
McLeod v. Evans, 66 Wis. 401.....	27
McMillan v. Richards, 9 Cal. 365.....	454
McReavy v. Esheleman, 4 Wash. 757.....	620
Madison, etc., Plank Road Co. v. Plank Road Co., 7 Wis. 59.....	173
Manhattan Trust Co. v. Seattle Coal & Iron Co., 16 Wash. 499.....	103, 495
Mayer v. Dean, 115 N. Y. 556.....	694
Mayor v. Lord, 9 Wall. 409.....	683
Mehlin v. Ice, 56 Fed. 12.....	340
Merchants' Ins. Co. v. Hill, 86 Mo. 466.....	222
Meyer v. Zingre, 18 Neb. 458.....	559
Miller v. Sherry, 2 Wall. 237.....	626
Mitchell v. Universal Life Ins. Co., 54 Ga. 289.....	694
Montana Co. v. St. Louis Mining Co., 152 U. S. 160.....	340
Montgomery v. State, 88 Ala. 141.....	444
Montville v. Houghton, 7 Conn. 543.....	593

Morley v. Lake Shore & M. S. Ry. Co., 146 U. S. 162.....	209, 219
Moses v. Julian, 84 Am. Dec. 114.....	19
Mount v. Lakenan, 21 Ohio St. 643.....	422
Mudgett v. Liebes, 14 Wash. 482.....	489
Muhlenberg v. Northwest Loan & T. Co., 26 Ore. 132.	27
Mullan v. Philadelphia & S. M. S. Co., 78 Pa. St. 25.....	541
Mullen v. Sackett, 14 Wash. 100.....	449
Mullett's Adm'x. v. United States, 150 U. S. 566.....	490
Munson v. Exchange National Bank, 19 Wash. 125.....	159
Murdock v. Clarke, 90 Cal. 427.....	278
National Trust Co. v. Miller, 33 N. J. Eq. 155.....	171
Newport v. Newport, 5 Wash. 114.....	608
New Whatcom v. Bellingham Bay Imp. Co, 10 Wash. 378.	230
New Whatcom v. Bellingham Bay Imp. Co., 16 Wash. 131.....	203 673
New York, etc. R. R. Co., v. Winans, 17 How. 30.....	526
Nieman v. Michigan Central R. Co., 80 Mich. 197.....	354
Nonotuck Silk Co. v. Flanders, 87 Wis. 237.....	57
Nord Deutscher Lloyd S. S. Co. v. Ingebregetsen, 57 N. J. Law, 400.....	242
Northern Pacific R. R. Co. v. Territory, 3 Wash. T. 303.....	524
Northwestern & Pacific Hypotheek Bank v. Griffiths, 18 Wash. 69	128
Northwestern & Pacific Hypotheek Bank v. Spokane, 18 Wash. 456.....	230
Northwestern Mut. Life Ins. Co. v. Park Hotel Co, 37 Wis. 125.....	12
Oakley v. Aspinwall, 3 N. Y. 547.....	19
O'Callaghan v. O'Callaghan, 69 Ill. 552	327
Ohio and I. R. R. Co. v. Com'rs. of Wyandot County, 7 Ohio St. 278	681
Oliver v. Harvey, 5 Ore. 360.....	633
Olsen v. Newton, 3 Wash. 429.....	197
Olympia Water Works v. Thurston County, 14 Wash. 268	316, 574
Oregon, etc., Investment Co. v. Rathbun, 5 Sawy. 32.....	236
Orton v. State, 12 Wis. 509.....	636
Palmer v. Palmer, 36 Mich. 489.....	425
Pearson v. Hopkins, 2 N. J. Law, 181.....	15
People v. Banks, 67 N. Y. 568	444
People v. Biggins, 96 Ill. 481.....	178
People v. Board of Police Com'rs., 32 N. Y. Supp. 18.....	15
People v. Board of Trustees of Village of Saratoga Springs, 39 N. Y. Supp. 607.	26
People v. Commissioners of Excise, 61 How. Pr. 514.....	11
People v. Common Council of the City of Auburn, 33 N. Y. Supp. 165	16
People v. Haun, 44 Cal. 96	437
People v. Mahoney, 18 Cal. 181	14
People v. Rome, W. & O. R. R. Co., 103 N. Y. 95	530
People v. Stapleton, 18 Colo. 568.....	255
People v. Suffolk Common Pleas, 18 Wend. 550	18
People v. Talmage, 6 Cal. 256.....	636
People v. Turner, 117 N. Y. 227.....	223
People v. Williams, 24 Cal. 31	14
People v. Wilson, 64 Ill. 195.....	247
Peralta v. Ginochio, 47 Cal. 459.....	145
Petersen v. Chemical Bank, 32 N. Y. 21.....	127
Peterson v. Smith, 6 Wash. 164.....	358
Peterson v. Wisconsin Central R. Co., 86 Wis. 206.....	354
Phalen v. Virginia, 8 How. 163.....	224
Philadelphia National Bank v. Dowd, 38 Fed. 172.....	27
Phipps v. Taylor, 15 Ore. 484.....	305
Pierce v. Benjamin, 14 Pick. 356.....	649
Pierce v. Delamater, 1 N. Y. 17.....	15
Pittsburg Carbon Co. v. McMellin, 119 N. Y. 46.....	171

Pitzer v. Russel, 4 Ore. 124.....	225
Pleasants v. Davidson, 34 Tex. 459.....	608
Poncin v. Furth, 15 Wash. 201.....	613
Port v. Parfit, 4 Wash. 369.....	619
Porter v. Williams, 9 N. Y. 142.....	171
Portland Lumbering & Mfg. Co. v. East Portland, 18 Ore. 21.....	409
Potwin Place v. Tapena Ry. Co., 51 Kan. 609.....	528
Powell v. Pugh, 13 Wash. 577.....	92
Price v. Scott, 13 Wash. 575.....	267
Prosser v. Wapello County, 18 Iowa, 327.....	527
Provident Loan & Trust Co. v. Walcott, 5 Kan. App. 473.....	422
Puckett v. Moody, 17 Wash. 609.....	110
Race v. Weston, 86 Ill. 91.....	694
Railroad Commissioners v. Portland, etc., R. R. Co., 63 Me. 269.....	528
Raisch v. Board of Education, 81 Cal. 542.....	677
Randall v. Kehlor, 60 Ma. 37.....	340
Randall v. State, 16 Wis. 340.....	636
Rands v. Clarke County, 15 Wash. 697.....	449
Rauh & Scholl, 12 Wash. 135.....	30
Rawson v. Ellsworth, 13 Wash. 668.....	267
Redford v. Spokane St. Ry. Co., 15 Wash. 419.....	59
Rex v. Severn & Wye Ry. Co., 2 Barn. & Ald. 640.....	528
Rexford v. Knight, 11 N. R. 308.....	223
Reynolds v. McFadden, 36 Tex. 129.....	608
Richards v. Cincinnati, 31 Ohio St. 506.....	532
Rogers v. Miller, 13 Wash. 82.....	131
Roth v. Union Depot Co., 13 Wash. 525.....	345
Rowe v. Ballard, 19 Wash. 1.....	345
Roy & Co. v. Scott, Hartley & Co., 11 Wash. 399.....	104, 172
Rugan v. Sabin, 53 Fed. 415.....	293
Ryus v. Gruble, 31 Kan. 767.....	422
Sadowski v. Michigan Car Co., 84 Mich. 100.....	542
Salling v. Johnson, 25 Mich. 489.....	683
Sample v. Hale, 34 Neb. 220.....	593
San Antonio St. Ry. Co. v. State, <i>ex rel.</i> Elmendorf, 90 Tex. 520.....	529
Sanger v. Nightingale, 122 U. S. 176.....	222
Savannah & O. Canal Co. v. Shuman, 91 Ga. 400.....	525
Savin's Case, 131 U. S., 267.....	252
Sawtelle v. Weymouth, 14 Wash. 21.....	634
Scheffel v. Hays, 58 Fed. 457.....	293
Scholey v. De Mattos, 18 Wash. 504.....	192
School District v. Cole, 4 Wash. 395.....	489
Sears v. Williams, 9 Wash. 428.....	592, 627
Seattle v. O'Connell, 16 Wash. 625.....	178
Seattle v. Pearson, 15 Wash. 575.....	41
Seattle National Bank v. Carter, 13 Wash. 281.....	72
Seibert v. Lewis, 122 U. S. 284.....	215
Selden v. Equitable Trust Co., 94 U. S. 419.....	236
Shumway v. Orchard, 12 Wash. 104.....	402
Skagit County v. Stiles, 10 Wash. 389.....	186, 204
Skeel v. Christenson, 17 Wash. 649.....	64
Smith v. Commissioners, 2 Woods, 596.....	683
Smith v. People, 2 Colo. App. 99.....	683
Smith v. Smith, 80 Cal. 323.....	278
Smith v. Smith, 15 Wash. 239.....	608
Snohomish County v. Hayward, 11 Wash. 429.....	186, 204
Snohomish County v. Ruff, 15 Wash. 637.....	196

CASES CITED.

xix

Soule v. Seattle, 6 Wash. 315.....	409
Spokane St. Ry. Co. v. Spokane Falls, 6 Wash. 521.....	531
Stallcup v. Tacoma, 13 Wash. 152.....	682
Stanley v. Supervisors, 121 U. S. 535.....	316
Stanton v. State, 5 S. D. 515.....	696
State v. Ackles, 8 Wash. 462.....	37
State v. Anderson, 40 Iowa, 207.....	245
State v. Barnes, 16 Neb. 37.....	28
State v. Blake, 2 Ohio St. 147.....	422
State v. Conway, 18 Ohio, 235.....	421
State v. Cushing, 17 Wash. 544.....	59
State v. Darr, 63 N. C. 516.....	348
State v. Day, 4 Wash. 108.....	272
State v. Donnell, 11 Iowa, 452.....	348
State v. Duncan, 7 Wash. 336.....	466
State v. Elswood, 15 Wash. 453.....	378
State v. Faulds, 17 Mont. 140.....	255
State v. Frew, 24 W. Va. 416.....	255
State v. Hartford, etc., R. R. Co., 29 Conn. 538.....	528
State v. Hubbell, 18 Wash. 482.....	706
State v. Hunter, 18 Wash. 670.....	377
State v. Jersey City, 24 N. J. Law, 662.....	316
State v. Kaiser, 20 Ore. 50.....	249
State v. Keen, 10 Wash. 93.....	37
State v. Kelly, 32 Ohio St. 430.....	422
State v. Morristown, 34 N. J. Law, 445.....	316
State v. Murphy, 48 Pac. 628.....	424
State v. Owens, 15 Wash. 468.....	268
State v. Payne, 10 Wash. 553.....	275
State v. Rogan, 18 Wash. 43.....	95
State, <i>ex rel.</i> Attorney General v. Morrison, 18 Wash. 664.....	86
State, <i>ex rel.</i> Banks v. Board of County Com'rs, 18 Wash. 160.....	478
State, <i>ex rel.</i> Bartelt v. Liebes, 19 Wash. 589.....	627
State, <i>ex rel.</i> Barton v. Hopkins, 14 Wash. 59.....	449
State, <i>ex rel.</i> Coffin v. Horton, 21 Nev. 466.....	636
State, <i>ex rel.</i> Coiner v. Wickersham, 16 Wash. 161.....	330
State, <i>ex rel.</i> Dodge v. Longhorne, 12 Wash. 588.....	132
State, <i>ex rel.</i> Fairhaven Land Co. v. Cheetham, 17 Wash. 131.....	594
State, <i>ex rel.</i> Hemen v. Ballard, 16 Wash. 418.....	232
State, <i>ex rel.</i> Hinckey v. Allyn, 7 Wash. 285.....	21
State, <i>ex rel.</i> McCashin v. Smith, 65 Wis. 93.....	348
State, <i>ex rel.</i> McGraw v. Ensign, 11 Neb. 529.....	348
State, <i>ex rel.</i> McReavy v. Burke, 8 Wash. 412.....	332
State, <i>ex rel.</i> Manhattan Trust Co. v. Superior Court, 17 Wash. 380.....	495
State, <i>ex rel.</i> Merle v. Dubuclet, 26 La. An. 127.....	684
State, <i>ex rel.</i> Mills v. Kispert, 21 Wis. 392.....	681
State, <i>ex rel.</i> News Pub. Co. v. Mulligan, 3 Wash. 144.....	681
State, <i>ex rel.</i> Nohle v. Superior Court, 15 Wash. 500.....	132
State, <i>ex rel.</i> Pacific Coast Steamship Co. v. Superior Court, 12 Wash. 548.....	619
State, <i>ex rel.</i> Palmer v. Webster, 20 Mont. 219.....	593
State, <i>ex rel.</i> Porter v. Headlee, 18 Wash. 220.....	478
State, <i>ex rel.</i> Rice v. County Judge, 7 Iowa, 186.....	524
State, <i>ex rel.</i> Scully v. Canal, etc., St. R. R. Co., 23 La. An. 333.....	530
State, <i>ex rel.</i> Seattle v. Carson, 6 Wash. 250.....	655
State, <i>ex rel.</i> Sheehan v. Headlee, 17 Wash. 637.....	479
State, <i>ex rel.</i> Whatcom County v. Purdy, 14 Wash. 343.....	360
Stewart v. Gould, 8 Wash. 367.....	174

Stix v. Keith, 85 Ala. 465.....	649
Stockwell v. Township Board, 22 Mich. 341.....	19
Stone v. Boone, 24 Kan. 337.....	557
Storey v. People, 79 Ill. 45.....	246
Stuart v. Palmer, 74 N. Y. 183.....	316
Sturoc's Case, 97 Am. Dec. 630.....	251
Supervisors v. United States, 4 Wall. 435.....	613
Sutton v. Snohomish, 11 Wash. 24.....	6
Swinburne v. Mills, 17 Wash. 611.....	707
Talbott v. Whipple, 14 Allen, 177.....	565
Talcott v. Pine Grove Township, 23 Fed. Cas. 653.....	526
Talmage v. Pell, 7 N. Y. 328.....	171
Teal v. Walker, 111 U. S. 242.....	453
Tennessee v. Sneed, 96 U. S. 74.....	222
Terry v. Anderson, 95 U. S. 628.....	222
Tewksbury v. Magraff, 33 Cal. 237.....	144
Thomas v. Railroad Co., 101 U. S. 71.....	526
Thomas v. Town of Mason, 39 W. Va. 526.....	677
Thompson v. Allen County, 115 U. S. 550.....	178
Thompson v. Canal Fund Com'rs, 2 Abb. Pr. 248.....	668
Thorington v. Merrick, 101 N. Y. 5.....	557
Tinkham v. Hayworth, 31 Ill. 519.....	27
Tippets v. Heane, 1 Cromp. M. & R. 252.....	164
Titsworth v. Frauenthal, 52 Ark. 254.....	305
Trust Co. v. Galliher, 12 Wash. 507.....	268
Turner v. Bailey, 12 Wash. 634.....	103, 408
Tuttle v. Dewey, 44 Iowa, 306.....	382
Ullshafer v. Stewart, 71 Pa. St. 170.....	257
Union Mutual Ins. Co. v. Union Mills Plaster Co., 37 Fed. 286.....	454
Union Pacific R. R. Co. v. Hall, 91 U. S. 343.....	523
United States v. Bradley, 10 Pet. 343.....	594
United States v. Council of Keokuk, 6 Wall. 518.....	684
United States v. Guthrie, 17 How. 284.....	330
United States v. Tingey, 5 Pet. 115.....	594
Upton v. Englehart, 3 Dill. 496.....	171
Vance v. Vance, 108 U. S. 514.....	223
Van Cott v. Van Brunt, 2 Abb. N. C. 283.....	170
Van Eaton v. Napier, 63 Miss. 222.....	423
Van Lehn v. Morse, 16 Wash. 219.....	22
Virginia v. Rives, 100 U. S. 313.....	524
Volkman v. Chicago, etc., Ry. Co., 35 Am. & Eng. R. R. Cases, 204.....	353
Wabash Ry. Co. v. McDaniels, 107 U. S. 454.....	476
Wagar v. Stone, 36 Mich. 364.....	454
Walton v. Develing, 61 Ill. 201.....	683
Walton v. United States, 9 Wheat. 656.....	421
Ward v. Howard, 12 Ohio St. 158.....	557
Ware v. State, 74 Ind. 181.....	423
Washington Central Imp. Co. v. Newlands, 11 Wash. 212.....	695
Waters-Pierce Oil Co. v. Cook, 6 Tex. Civ. App. 573.....	15
Watson v. Coburn, 35 Neb. 492.....	649
Watson v. Pugh, 9 Wash. 665.....	110
Watson v. Sawyer, 12 Wash. 35.....	613
Webster v. Howe Machine Co., 54 Conn. 394.....	174
Wegman v. Childs, 41 N. Y. 159.....	257
Weigle v. Cascade Ins. Co., 12 Wash. 449.....	268
Welty v. Indianapolis & V. R. R. Co., 105 Ind. 55.....	354

CASES CITED.

xxi

West Seattle Land & Imp. Co. v. Herren, 16 Wash. 665.....	696
Wheeler, Osgood & Co. v. Everett Land Co., 14 Wash. 630.....	174
Wheeler v. Walden, 17 Neb. 122.....	565
Whipley v. Mills, 9 Cal. 641.....	633
Whiteside v. United States, 93 U. S. 247.....	636
Whitney Arms Co. v. Barlow, 63 N. Y. 62.....	594
Whitney v. Gammon, 103 Iowa, 363.....	423
Willamette Casket Co. v. Cross, etc., Co., 12 Wash. 190.....	445
Williams v. Edmunds, 75 Mich. 92.....	598
Williams v. Robinson, 6 Cush. 334.....	19
Williams v. Shoudy, 12 Wash. 362.....	121
Wilson v. Aberdeen, 19 Wash. 89.....	620
Winston v. Spokane, 12 Wash. 524.....	322
Wolff v. New Orleans, 103 U. S. 358.....	212
Wood v. Myrick, 16 Minn. 494.....	424
Wooster v. Broadway & S. A. R. R. Co., 72 Hun. 197.....	598
Yates v. National Home, 103 U. S. 674.....	490

STATUTES CITED AND CONSTRUED.

Constitution, article 1, section 3.....	208, 337
Constitution, article 1, section 5.....	242
Constitution, article 1, section 16.....	202, 358
Constitution, article 1, section 17.....	349
Constitution, article 1, section 22.....	466
Constitution, article 1, section 23.....	208
Constitution, article 2, section 19.....	398, 443
Constitution, article 2, section 24.....	40
Constitution, article 2, section 25.....	488
Constitution, article 2, section 33.....	85
Constitution, article 3, section 5.....	637
Constitution, article 3, section 19.....	468
Constitution, article 4, section 1.....	21, 310
Constitution, article 4, section 4.....	10
Constitution, article 4, section 5.....	21
Constitution, article 4, section 27.....	41
Constitution, article 5, section 3.....	332
Constitution, article 8, section 4.....	661
Constitution, article 8, section 6.....	448
Constitution, article 11, section 8.....	398
Constitution, article 11, sections 10, 11.....	41
Constitution, article 12.....	498
Constitution, article 12, section 11.....	235
Constitution, article 15, sections 1, 2.....	46
Constitution, article 15, section 3.....	429
Constitution, article 17, section 2.....	302
Code, 1881, section 193.....	452
General Statutes, 1891, title 21, chapter 2.....	186, 204
General Statutes, 1891, section 61 (Bal. Code, section 100).....	637
General Statutes, 1891, section 106 (Bal. Code, section 156).....	489
General Statutes, 1891, section 113 (Bal. Code, section 163).....	489
General Statutes, 1891, section 115 (Bal. Code, section 165).....	489
General Statutes, 1891, section 281, subdivision 2 (Bal. Code, section 342).....	574
General Statutes, 1891, section 298.....	574
General Statutes, 1891, section 535 (Bal. Code, section 754).....	329
General Statutes, 1891, section 758 (Bal. Code, section 1276).....	532
General Statutes, 1891, section 1184 (Bal. Code, section 2777).....	637
General Statutes, 1891, section 1398 (Bal. Code, section 4489).....	550
General Statutes, 1891, section 1500 (Bal. Code, section 4253).....	173
General Statutes, 1891, section 1507 (Bal. Code, section 4262).....	99
General Statutes, 1891, section 1510 (Bal. Code, section 4265).....	514
General Statutes, 1891, section 1511 (Bal. Code, section 4266).....	235, 513
General Statutes, 1891, section 1513 (Bal. Code, section 4269).....	513
General Statutes, 1891, section 1588 (Bal. Code, section 4280).....	100, 497
General Statutes, 1891, section 1648 (Bal. Code, section 4558).....	445
General Statutes, 1891, sections 1784-1861.....	384
General Statutes, 1891, section 1978.....	575
General Statutes, 1891, section 2415 (Bal. Code, section 5925).....	592, 627
General Statutes, 1891, section 3050 (Bal. Code, section 1627).....	348

General Statutes, 1891, sections 3088, 3089 (Bal. Code, sections 376, 377).....	139
Code of Procedure, 1891, title 9, chapter 6 (Bal. Code, title 31, chapter 5, article 3.....	205
Code of Procedure, 1891, section 113 (Bal. Code, section 4798)	419
Code of Procedure, 1891, section 115 (Bal. Code, section 4800).....	419
Code of Procedure, 1891, section 138 (Bal. Code, section 4828)	134, 138
Code of Procedure, 1891, section 139 (Bal. Code, section 4829).....	135
Code of Procedure, 1891, section 148 (Bal. Code, section 4838).....	138
Code of Procedure, 1891, section 163, subd. 4 (Bal. Code, 4857)	13
Code of Procedure, 1891, section 189 (Bal. Code, section 4907).....	665
Code of Procedure, 1891, section 193 (Bal. Code, section 4911).....	616
Code of Procedure, 1891, section 288 (Bal. Code, section 5350).....	557
Code of Procedure, 1891, section 289 (Bal. Code, section 5351, subd. 8).....	557
Code of Procedure, 1891, section 318 (Bal. Code, section 5376).....	284
Code of Procedure, 1891, section 326 (Bal. Code, section 5456)	452
Code of Procedure, 1891, section 339 (Bal. Code, section 4978).....	59
Code of Procedure, 1891, section 359 (Bal. Code, section 4999).....	275
Code of Procedure, 1891, section 400, subd. 8 (Bal. Code, section 5071)	280
Code of Procedure, 1891, section 449.....	402
Code of Procedure, 1891, section 491 (Bal. Code, section 5262).....	405
Code of Procedure, 1891, section 504 (Bal. Code, section 5288).....	380
Code of Procedure, 1891, section 512	381
Code of Procedure, 1891, section 529 (Bal. Code, section 5500).....	401
Code of Procedure, 1891, section 539 (Bal. Code, section 5516).....	278
Code of Procedure, 1891, section 547 (Bal. Code, section 5525)	561
Code of Procedure, 1891, section 561 (Bal. Code, section 5539).....	340
Code of Procedure, 1891, section 564 (Bal. Code, section 5542).....	564
Code of Procedure, 1891, sections 676, 677 (Bal. Code, sections 5678, 5679).....	571
Code of Procedure, 1891, section 695 (Bal. Code, section 5685).....	75
Code of Procedure, 1891, section 696 (Bal. Code, section 5685).....	75, 424
Code of Procedure, 1891, section 722 (Bal. Code, section 5826).....	308
Code of Procedure, 1891, section 778 (Bal. Code, section 5798).....	242
Code of Procedure, 1891, section 789 (Bal. Code, section 5809).....	243
Code of Procedure, 1891, section 803 (Bal. Code, section 5166).....	612
Code of Procedure, 1891, section 955	607
Code of Procedure, 1891, section 977 (Bal. Code, section 6226).....	608
Code of Procedure, 1891, section 979 (Bal. Code, section 6228).....	608
Code of Procedure, 1891, section 980 (Bal. Code, section 6229).....	112
Code of Procedure, 1891, section 1128 (Bal. Code, section 6780).....	436
Code of Procedure, 1891, section 1189 (Bal. Code, section 6782).....	467
Code of Procedure, 1891, section 1253 (Bal. Code, section 6859).....	54, 412
Code of Procedure, 1891, section 1313 (Bal. Code, section 6949).....	95
Code of Procedure, 1891, section 1422.....	375
Code of Procedure, 1891, section 1588 (Bal. Code, section 6700).....	348
Penal Code, 1891, chapter 14 (Bal. Code, section 7436)	377
Penal Code, 1891, section 20 (Bal. Code, section 7035).....	37
Penal Code, 1891, section 22 (Bal. Code, section 7057).....	377
Penal Code, 1891, section 139 (Bal. Code, section 7259).....	40
Penal Code, 1891, section 301 (Bal. Code, section 7435).....	41
Laws 1854, page 75.....	557
Laws 1854, page 162.....	452
Laws 1855, page 266.....	609
Laws 1867, page 97	557
Laws 1867, page 49.....	609
Laws 1869, page 130, section 498.....	452
Laws 1873, page 251, section 325.....	553
Laws 1889-90, page 345, section 11.....	488
Laws 1889-90, page 652	186, 201
Laws 1891, page 31 (Bal. Code, section 4783)	252

Laws 1891, page 108, section 2 (Bal. Code, section 744)	308
Laws 1891, page 109, section 4 (Bal. Code, section 746)	308
Laws 1891, page 111, section 12 (Bal. Code, section 754)	329
Laws 1891, page 183, section 10 (Bal. Code, section 5534)	337
Laws 1891, page 195, section 1 (Bal. Code, section 2721)	309
Laws 1891, page 195, section 2 (Bal. Code, section 2722)	310
Laws 1891, page 196, sections 3, 4 (Bal. Code, sections 2723, 2724)	311
Laws 1891, page 355, section 7	76
Laws 1893, page 6	21
Laws 1893, page 114, section 9 (Bal. Code, section 5058)	375
Laws 1893, page 116, section 12 (Bal. Code, section 5061)	21
Laws 1893, page 119, section 1 (Bal. Code, section 6500)	119, 355, 629
Laws 1893, page 119, section 1 subd. 6 (Bal. Code, section 6500)	196, 629
Laws 1893, page 121, section 5 (Bal. Code, section 6504)	347
Laws 1893, page 167	655
Laws 1893, pages 226-231 (Bal. Code, sections 1139-1149)	230
Laws 1893, page 229, section 6, Bal. Code, section 1144)	230
Laws 1893, page 231	670
Laws 1893, page 247 (Bal. Code, sections 107-109)	332
Laws 1893, page 253, sections 1, 2 Bal. Code, sections 4585, 4586	443
Laws 1893, page 347	655
Laws 1893, page 366, section 96	361
Laws 1893, page 413	704
Laws 1893, page 414, section 21 (Bal. Code, section 4391)	319
Laws 1893, page 418 (Bal. Code, section 4332)	352, 536
Laws 1895, page 18 (Bal. Code, sections 835-837)	344
Laws 1895, page 81 (Bal. Code, section 5166)	84, 192
Laws 1895, page 81 (Bal. Code, section 6502)	690
Laws 1895, page 82 (Bal. Code, section 3771 et seq.)	357, 573
Laws 1895, page 88, section 17 (Bal. Code, section 3787)	358
Laws 1895, page 115, section 4 (Bal. Code, section 5741)	315
Laws 1895, page 117, section 16 (Bal. Code, section 5755)	386, 525, 676
Laws 1895, page 118, sections 20, 21 (Bal. Code, sections 5759, 5760)	676
Laws 1895, page 139 (Bal. Code, sections 4740-4748)	59
Laws 1895, page 142 (Bal. Code, sections 3755-3762)	201
Laws 1895, page 157, section 15 (Bal. Code, section 2819)	488
Laws 1895, page 158, section 17 (Bal. Code, section 2821)	488
Laws 1895, page 253, section 2	665
Laws 1895, page 266, sections 36, 38	660
Laws 1895, page 304 (Bal. Code, sections 3673-3715)	205
Laws 1895, page 349 (Bal. Code, sections 3668-3672)	122
Laws 1895, page 407 (Bal. Code, section 1786)	665
Laws 1895, page 452	331
Laws 1895, page 513, sections 14, 15, 21	178, 186
Laws 1895, page 554, section 61	302
Laws 1895, page 561, section 82	302, 632
Laws 1897, page 19	377
Laws 1897, page 52 (Bal. Code, sections 5148-5150)	207, 219
Laws 1897, page 53	488
Laws 1897, page 136 (Bal. Code, title 11, chapter 1)	656
Laws 1897, page 160, section 54 (Bal. Code, section 1710)	317
Laws 1907, page 162, section 58 (Bal. Code, section 1714)	315, 655
Laws 1897, page 174, section 78 (Bal. Code, section 1734)	317
Laws 1897, page 181, section 94 (Bal. Code, section 1749)	187
Laws 1897, page 182, section 96 (Bal. Code, section 1751)	317
Laws 1897, page 192, section 118 (Bal. Code, section 1771)	187
Laws 1897, page 231, section 5 (Bal. Code, section 2134)	433
Laws 1897, page 241, section 17 (Bal. Code, section 2147)	433

Laws 1897, page 244, sections 27, 28 (Bal. Code, section 2157, 2158).....	432
Laws 1897, page 254, section 52 (Bal. Code, section 2182).....	199
Laws 1897, page 255, section 53 (Bal. Code, section 2183).....	48
Laws 1897, page 316.....	670
Laws 1897, page 331 (Bal. Code, 762a).....	330, 397
Laws 1897, page 356 sections 128-135 (Bal. Code, sections 2398, 2405).....	120
Charter, Port Townsend, Laws 1881 page 115 sections 6, 7, 107.....	408
Charter, Seattle (Freeholders, 1890) article 4, section 36.....	41
Charter, Seattle (Freeholders, 1896) article 8, section 11, subd. 2.....	670
Charter, Seattle (Freeholders, 1896) article 8, section 12.....	672
Charter, Seattle (Freeholders, 1896) article 8, section 13.....	673

ERRATA.

- Page 95. Running title, read *Mason* in place of "Manson."
- Page 159. Eighth line from bottom, read *Gibbon* in place of "Gibson."
- Page 159-164. Running title, read *Gibbon* in place of "Gibson."
- Page 306. Ninth line from top, read *commitment* in place of "committment"
- Page 556. Second line of syllabus, read *arising* in place of "arrising."
- Page 652-656. Running title, read *Pierce County* in place of "State."

REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF WASHINGTON.

[No. 2830. Decided February 23, 1898.]

MARY ELLEN ROWE *et al.*, Appellants, v. CITY OF BAL-
LARD, Respondent.

MUNICIPAL CORPORATIONS — DEFECTIVE STREETS — CONTRIBUTORY NEG-
LIGENCE — QUESTION FOR JURY.

Whether a woman was chargeable with negligence contributing to injuries received by her in falling into a hole while walking along an unimproved street full of holes and stumps, on a dark night, without lantern or companion, when she might have gone around a longer way home by traveling upon improved sidewalks, was a question for the jury.

Whether plaintiff in such a case knew, or should be held to have known, of the existence of the excavation into which she fell, by reason of her residence at no great distance therefrom, is a question for the jury, when she testifies as to her ignorance thereof.

Where a street has been platted as part of a city and used by the public as a highway, the city is liable for injuries received by a passenger thereon who without fault falls into an excavation made by the city in the street, although the city may have never assumed to improve the street, but has allowed it to remain in its natural condition, aside from excavations made therein for gravel to use elsewhere.

19	1
19	345
19	1
20	9
20	554
20	555
20	556
19	1
34	206
19	1
40	37

Appeal from Superior Court, King County.—Hon. ORANGE JACOBS, Judge. Reversed.

W. D. Lambuth, for appellants:

Streets and highways are treated and the rules laid down and established as to liability of cities, regardless of whether the street in question is a graded or improved street or not. *Carroll v. Centralia Water Co.*, 5 Wash. 617; *Beck v. Carter*, 68 N. Y. 283 (23 Am. Rep. 175); *Lindholm v. St. Paul*, 19 Minn. 245; *Murphy v. Indianapolis*, 83 Ind. 76; *Meiners v. St. Louis*, 32 S. W. 637; *Brennan v. St. Louis*, 92 Mo. 482; *Sexton v. Zett*, 44 N. Y. 430; *Sutton v. Snohomish*, 11 Wash. 24 (48 Am. St. Rep. 847); *Lorence v. Ellensburg*, 13 Wash. 341 (52 Am. St. Rep. 42).

Where the street has been rendered unsafe, or less secure, by the direct act, order or authority of the municipal corporation, no question has been made or can reasonably exist as to liability of the city. *Oliver v. Worcester*, 102 Mass. 489 (3 Am. Rep. 485); *Young v. Harvey*, 16 Ind. 314; *Springfield v. LeClaire*, 49 Ill. 478. The digging of such a pit as the one in this case and leaving it unguarded is negligence, and such hole is a nuisance. *Hutchinson v. Olympia*, 2 Wash. T. 320; *Denver v. Dunsmore*, 3 Pac. 709; *Hadley v. Taylor*, L. R. 1 C. P. 53.

Where the excavation is outside the traveled way, the question of liability depends on the circumstances of the particular case and is for the jury. *Cobb v. Standish*, 14 Me. 198; *Norwich v. Breed*, 30 Conn. 535; *Murphy v. Gloucester*, 105 Mass. 470; *Hinckley v. Somerset*, 145 Mass. 326; *North Manheim v. Arnold*, 119 Pa. St. 380 (4 Am. St. Rep. 650); *Koester v. Ottumwa*, 34 Iowa, 41. Sufficiency of highway always a question for the jury. *Wheeler v. Westport*, 30 Wis. 392; *Saylor v. Montesano*,

Feb. 1898.]

Argument of Counsel.

11 Wash. 384; *Craig v. Sedalia*, 63 Mo. 419; *Byerly v. Anamosa*, 79 Iowa, 204; *Bassett v. St. Joseph*, 53 Mo. 290 (14 Am. Rep. 446). It is not negligence *per se* to travel after night without a light. *Williams v. Clinton*, 28 Conn. 264; *Daniels v. Lebanon*, 58 N. H. 284. That traveler might have taken another way is immaterial. *Erie v. Schwingle*, 22 Pa. St. 384 (60 Am. Dec. 87.)

P. V. Davis, for respondent:

It cannot be denied that the plaintiff, Mary Ellen Rowe, knew, or ought to have known, the general condition of First avenue and of the existence of the excavation. She lived but four hundred feet from it, along the same street, for at least two years, and had frequently traveled along First avenue. She passed down the very street the night of the accident before dark, and within a few feet of this excavation; and then, after church, when it was extremely dark, she attempted to go home along this street without a companion and without a lantern, when it was absolutely unnecessary for her to do so. We contend, under this state of facts, she was bound to know of the excavation. It appears from her own testimony that she was wandering about in the dark, and did not know where she was, and under these circumstances she was certainly guilty of gross and culpable contributory negligence as a matter of law. *Hesser v. Grafton*, 11 S. E. 211; *Morrison v. Shelby County*, 19 N. E. 316; *Brucker v. Covington*, 69 Ind. 33; *Pittman v. El Reno*, 46 Pac. 495; *Casey v. Fitchburg*, 38 N. E. 499; *McCabe v. Buffalo*, 18 N. Y. Supp. 389; *Cummins v. Syracuse*, 3 N. E. 680; *Hartman v. Muscatine*, 30 N. W. 859; *Wright v. St. Cloud*, 55 N. W. 819; *Church v. Howard City*, 69 N. W. 651; *Parkhill v. Brighton*, 15 N. W. 853; *Phillips v. Ritchie County*, 7 S. E. 427; *Schaefer v. Sandusky*, 33 Ohio St.

246 (31 Am. Rep. 533); *Township of Crescent v. Anderson*, 8 Atl. 379; *City of Meridian v. Hyde*, 11 South. 108; *Wilson v. Charlestown*, 8 Allen, 137; *Lovenguth v. Bloomington*, 71 Ill. 238; *Mt. Vernon v. Dusouchett*, 2 Ind. 586 (54 Am. Dec. 467); *Jonesboro, etc., Turnpike Co. v. Baldwin*, 57 Ind. 86; *Fulliam v. Muscatine*, 30 N. W. 861.

The opinion of the court was delivered by

DUNBAR, J.—This is an action brought by the appellants, Mary Ellen Rowe and her husband Anthony Rowe, for alleged damages sustained by Mary Ellen Rowe in falling into an excavation or pit in one of the streets within the corporate limits of Ballard. The street had not been graded at this point, but the evidence shows that it had been used by wagons, carriages and pedestrians, and that well-defined roads and paths had been beaten in such street. The hole was from six to ten feet deep and from fifty to sixty feet wide, and was at the intersection of two streets, and the banks around a part of the excavation were overhanging. Mrs. Rowe, in attempting to go from church one dark night, fell into this excavation and sustained the injuries complained of. After the testimony of the plaintiff had been submitted, on motion of the respondent a nonsuit was granted by the court. The motion alleged the facts that the evidence showed that the street was full of stumps and holes and not improved, that the plaintiff attempted to pass up the street on a dark night without a lantern or companion, and that she should have gone around Broadway, Second avenue and Crawford street to her home. The motion was sustained on the ground of contributory negligence. We think the court erred in granting this nonsuit, under the rule laid down by this court in *Carroll v. Centralia Water Co.*, 5 Wash. 613 (32 Pac. 609). In that case the injury was sustained by the plaintiff by stepping

into a hole in an alley, and this court held that it was immaterial whether the city had ever formally accepted the alley as a public highway or had improved it by grading or otherwise. The evidence in that case showed that the alley had not been graded, that it was a rough alley, but that there was a path leading down it, which had been used somewhat by the inhabitants of the city. The testimony in this case we think shows that the roads in the streets of the city of Ballard upon which this excavation existed were better defined and had been more universally traveled than the alley in the case above referred to, and it was held in that case that, inasmuch as the alley had been platted, it had been made a public highway over which all persons had the right at any and all times to pass. But in this case, although the street had not been graded, permission had been given by the city to the public to travel the street, such permission had been accepted and the street had been used to such an extent as to wear the roads and paths which we have before mentioned, and we know of no law which will allow a city to dig an excavation or to establish or make any pitfall within its corporate limits, and maintain the same without guards or warnings of any kind to the traveling public without being held responsible in damages to the parties who, without fault, fall into the same, even though such streets may not have been formally graded. Mr. Dillon, in his work on Municipal Corporations, § 1024, lays down the rule as follows:

“Where streets have been rendered *unsafe by the direct act, order or authority of the municipal corporation* (not acting through independent contractors, the effect of which will be considered presently), no question has been made, or can reasonably exist, as to the liability of the corporation for injuries thus produced, where the person suffering them is without contributory fault, or was using due care. Even in those states in which a municipality is not held *impliedly* liable to a private action for neglecting to keep

its streets in repair, it is yet held to be liable if it, or its officers under its authority, by positive acts place obstructions on the streets or by such acts otherwise render them unsafe, whereby travelers are injured."

And in this case the testimony was to the effect that this excavation had been at least partially made by the city authorities by taking the sand or gravel from the pit for the purpose of filling holes and depressions in the streets in other parts of the city. So that, outside of the question of whether the city would be liable for maintaining an excavation of this kind which had been made by others—a question which we do not now decide—under the testimony of this case, there is no question of its liability, provided, of course, that there was no contributory negligence on the part of the appellant. It is argued by the counsel for the city that contributory negligence was shown from the fact that Mrs. Rowe had been a resident of the city of Ballard for several years and that her residence was at no great distance from this excavation and that she must therefore necessarily have known of its existence. Mrs. Rowe testified positively that she did not know of the existence of this excavation, and whether, under the circumstances, she could be held to have known of it, was purely a question for the jury to decide. *Albion v. Hetrick*, 90 Ind. 545 (46 Am. Rep. 230); *Sutton v. Snohomish*, 11 Wash. 24 (48 Am. St. Rep. 847, 39 Pac. 273).

It is also insisted that inasmuch as there is a street which had a safe sidewalk upon which she might have traveled homeward that night, which would have taken her only a couple of blocks out of her way, it was negligent as a matter of law for her to have pursued her way up this unopened street. Under the condition of the roads and paths in this street described by the testimony, we do not think that it would have been negligent in any event for her to have chosen the way which she did to reach her home, but,

Feb. 1898.] Opinion of the Court—DUNBAR, J.

should it be held otherwise, her explanation for not going around by Broadway, it seems to us, is an acceptable one. After stating the way she went to church, she proceeds:

"Coming out I thought I would come the same way, as it was nearer than going on to Broadway, for going on Broadway you would have to go up Broadway, up Second avenue, down Crawford, and at that time Crawford had no railing to it, and right next to Mr. (Seal's?) on Crawford was a very dangerous place before the railing was put on, which has since been put on. Very often I was afraid of falling in there, so that it was much safer for me to come back up again First avenue than it would be to go even that way."

On this proposition, it is said in § 1008 of Dillon's *Municipal Corporations* (4th ed.):

"So sidewalks and street crossings are constructed for the use of foot-passengers but if these happen to be obstructed, or to be in such a dangerous condition as to deter an ordinarily prudent man from using them, then one may walk elsewhere."

And in any event the question of whether or not it was negligence to leave the sidewalk and pursue the open street was a question for the jury. On the ground of contributory negligence under such circumstances the rule is thus announced by Shearman and Redfield on the *Law of Negligence*, § 350:

"The question, what is a 'safe and convenient' road or bridge, or what is a 'defect or want of repair' therein, within the meaning of these terms as used in the statutes of the states to which we have referred, is one of fact for the jury to determine, under the instruction of the court, upon the circumstances of each particular case, such as the season of the year, the hour of the day or night, the manner in which the accident occurred, and the nature of the accident itself."

And this includes the other contention of the appellant that it was negligence for this woman to travel on a dark night along this street without any light and without any guide or companion. These are all, we think, under the almost universal authority, questions which should be submitted to the jury.

Finding, then, that the uncontradicted testimony of the plaintiff does not establish any contributory negligence on the part of the plaintiff as a question of law, the judgment will be reversed and the cause remanded with instructions to overrule the motion for a nonsuit.

GORDON, ANDERS and REAVIS, JJ., concur.

(No. 2842. Decided February 23, 1898.)

THE STATE OF WASHINGTON, *on the Relation of F. T. Barnard, Appellant, v. BOARD OF EDUCATION OF CITY OF SEATTLE et al., Respondents.*

PROHIBITION — DISQUALIFICATION OF SCHOOL DIRECTOR TO TRY OFFICER
— POWER OF SUPREME COURT TO ISSUE SUPERSEDEAS — APPEAL —
SUPERSEDEAS BOND.

On appeal from a judgment quashing an alternative writ of prohibition, a bond conditioned as a supersedeas does not operate as a suspension of the judgment.

The supreme court has jurisdiction to issue an order of supersedeas to preserve the *status quo* of parties pending the determination of an appeal on its merits, under art. 4, § 4, of the constitution, giving the supreme court power to issue all writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction, when for want of such an order the appeal may be rendered of no avail to appellant, and the court's control of the appeal rendered ineffective.

Where a board of education is by law constituted a tribunal, from which there is no appeal, for the trial of its school officers,

19	8
d20	595
19	8
f21	229
21	230
19	8
26	283
19	8
e32	510
32	511
19	8
d35	881

Feb. 1896.]

Opinion of the Court—DUNBAR, J.

a member of the board who has caused charges to be preferred against a school superintendent because of personal hostility toward him, and has announced a determination to vote against him, whatever the evidence, is disqualified to sit as a member of such tribunal during the trial of the superintendent and, if he attempts to participate as a member of the tribunal, may be restrained by the issuance of a writ of prohibition.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Reversed.

Osborn, Steele & Aust, and *Donworth & Howe*, for appellant.

James F. McElroy, and *John B. Hart*, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—The appellant, F. J. Barnard, is superintendent of public schools of the city of Seattle. Charges were filed with the respondents, as the board of directors of said school district, charging the said Barnard with misfeasance and malfeasance in office, with conduct unbecoming a superintendent of schools, and with disobeying the rules of conduct established by the board of directors. Citation was issued to the appellant, citing him to appear before the board of directors to answer to the charges. The appellant objected to A. J. Wells, one of the board of directors, sitting as a member of the tribunal to hear and determine the charges, on the ground that said Wells was disqualified by reason of bias, prejudice and personal enmity towards the appellant. On the 17th day of December, 1897, on the application and affidavit of the appellant, Barnard, the superior court of King county, Wash., issued its writ of prohibition in the alternative to the respondents, staying proceedings until the further order of the court. On the return of said writ the superior court sustained a demurrer thereto quashing the writ, and entering judgment in favor of the defendants for their costs. The demurrer

was sustained upon the ground that no facts were stated sufficient to authorize the issuance of a writ. The appellant forthwith gave notice of appeal, and asked the court to fix the amount of the supersedeas bond. The court fixed the amount of the bond to operate as a supersedeas, but announced to the counsel for respondents in open court that the bond would operate only to stay execution for costs, because the judgment appealed from was not such a judgment as could be superseded. The appellant forthwith filed his bond on appeal in the amount fixed by the court, and conditioned as a supersedeas bond. The board of education, and Mr. Wells, sitting as a member thereof, proceeded with the hearing of the charges against the appellant. The appellant then applied to this court for an order of supersedeas, on which an alternative writ was granted, and the case is here now for final determination.

We are inclined to think that the bond upon appeal conditioned as supersedeas under our statutes did not operate to suspend and supersede the judgment quashing the alternative writ. But we think that this court, in the exercise of its discretion, by virtue of its inherent powers as an appellate tribunal, can issue an order of supersedeas to preserve the status quo of the parties, pending the determination of the appeal upon its merits. Section 4 of article 4 of the constitution of Washington, after reciting the original jurisdiction of the supreme court, says further:

“The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction.”

It is conceded that an appeal lies from the judgment of the court in quashing the writ, and, under the provision just read, for the purpose of making that appeal effective, and to insure the complete exercise of this court over that appeal, it becomes necessary and proper to supersede the

judgment, otherwise the right to appeal which the statute has given would be of no avail to the appellant, for if the board of directors in the meantime were to proceed to remove him, when the case finally reached this court on appeal it would have to be dismissed for want of merit, because the trial on merit would already have terminated. *People v. Commissioners of Excise*, 61 How. Pr. 514. We think this is exactly the kind of a case which is contemplated by the constitution, and that the only way that this court could maintain the complete exercise of its appellate jurisdiction would be by issuing the writ prayed for. There would be no meaning to the provision of the constitution, and no necessity for it, if it could only be held to apply to cases where supersedeas was provided for by the law. In *Home Fire Ins. Co. v. Dutcher*, 48 Neb. 755 (67 N. W. 766), it was held that in cases where the statute makes no provision for a supersedeas, as a matter of right, the court may, in its discretion, allow a supersedeas upon conditions which it may affix for the protection of the parties, and that it is within the power of the court, in its discretion, after obtaining jurisdiction of a case by appeal, to allow a supersedeas in cases not provided for by statute, and upon terms which the court may prescribe. To the same effect is *City of Janesville v. Janesville Water Co.*, 89 Wis. 159 (61 N. W. 770). In that case the court said:

“Within the limitation that the appeal is taken and prosecuted in good faith, and that the party asking it gives the reasonable security required for that purpose, a stay of proceedings during the pendency of an appeal is quite of course, and really a matter of right, without which an appeal allowed by law would often prove fruitless, and the appellate jurisdiction of the court be found inadequate to the ends of justice and the proper protection of the rights of parties during the pendency of the appeal.”

In *Hill v. Finnigan*, 54 Cal. 493, the court said:

“We have no doubt but this court has an inherent power to secure to the appellant the fruits of a successful appeal, if it can be done without depriving the respondent of a substantial right.”

And the qualification mentioned by the court in that case is not in point here, for there is nothing to prevent the board proceeding with the trial of the cause without the concurrence of the member objected to. In *Levy v. Goldberg*, 40 Wis. 308, it was held that the power of the court to stay proceedings in any matter appealed to it did not altogether depend upon statutory enactment, but was inherent in the court. The same announcement was made in *Northwestern Mut. Life Ins. Co. v. Park Hotel Co.*, 37 Wis. 125.

The substance of the affidavit for the writ is to the effect that A. J. Wells was a personal enemy of the relator, that he was a prime mover in having the charges preferred and prosecuted, that he was biased and prejudiced against relator, that he had no personal knowledge of any of the facts alleged in the charges, that he had publicly announced his intention to vote to find relator guilty, and that he proposed to vote to remove him from his office no matter what the evidence might be, and that his mind was made up and his determination fixed.

The case of *Fawcett v. Superior Court*, 15 Wash. 342 (46 Pac. 389, 55 Am. St. Rep. 894), is relied upon by the respondent to maintain his contention that the board of education cannot be restrained from proceeding. That was a quo warranto proceeding to try the right to an office. The judgment of ouster had been pronounced against Fawcett, and it was held by this court that the judgment was self-executing, and that without the aid of process or further action of the court it accomplished the object sought to be attained, so that there was nothing upon which the bond

could operate except for costs. But that is altogether different from the case at bar. It was the object of the appellant in this case to prevent himself from being placed in the position in which Fawcett was placed by the judgment of ouster. Were he to stand by, and allow the board to proceed and remove him from his office, then he would be as helpless as Fawcett was in the case cited; but it is for the very purpose of maintaining his rights and preventing his being overtaken by that condition that this stay is sought.

It is stoutly contended by the respondents that this case does not fall under any of the disqualifications of the judge provided in subd. 4 of § 163 of the Code of Procedure (Bal. Code, § 4857), and that, outside of the provisions of the code, a judge is only disqualified by having a financial interest in the result of the suit. We have examined with care all the authorities cited by the respondents to sustain this contention, but are of the opinion that they fail to do so. Most of the cases either fall within the doctrine of necessity, which is announced by some of the courts, where to challenge the judge successfully would prevent the hearing of the cause, as in cases where there was no other tribunal to try the case, or where the judge was sitting merely to declare the law and the case was tried by jury, and in all the cases we think an appeal would lie. It may be said here that no appeal lies from the decision of the board of directors, and the judges act in the capacity of jurors; and, while some courts have decided that the tests of the respective qualifications of judges and jurors are not the same, yet in a case of this kind, where the judges pass upon the facts, and it is a pure question of fact which is presented for their consideration and for their determination, we see no good reason why the test of qualification should be different; for the judge in this case is in reality a juror passing upon ques-

tions of fact. It is true that on page 52 of 12 Am. & Eng. Enc. Law, the proposition is announced that, "in the absence of statutory provisions, prejudice not based on property interest in the judge is not assignable as a legal cause of disqualification." But this broad assertion of the text is not borne out by the cases cited to sustain it, many of which are cited by the respondents in this case. For instance, in *McCauley v. Weller*, 12 Cal. 500, it was held by the supreme court of California, through TERRY, C. J., that

"the exhibition by a judge of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper and reprehensible, as calculated to throw suspicion upon the judgments of the court, and bring the administration of justice into contempt, are not, under our statute, sufficient to authorize a change of venue on the ground that the judge is disqualified from sitting."

But even admitting the correctness of that decision—which we are not inclined to do—the court evidently would have come to a different decision in a case of this kind, for they based the decision on the ground that the province of the judge was to decide questions of law alone, and that his decisions upon these points were not final, but, if erroneous, the party had his remedy by appeal. *People v. Mahoney*, 18 Cal. 181, is substantially the same holding, the argument being that, if the judge acted illegally on the trial, or denied the prisoner his legal rights, it could be remedied on appeal. In *People v. Williams*, 24 Cal. 31, the court quotes approvingly § 2945 of Wharton's Criminal Law, where that author says:

"The practice among the civilians extends the right of challenges for cause to the judges as well as the jurors; and the great inclination of authority is that the same causes which disqualify one disqualify the other. Where

the judge, like a chancellor, sits to try both facts and law, as in the case with the civilians, there is peculiar reason for the application to him of a jealous test."

But in this case the judges were simply sitting as judges to pass upon questions of law, and the court discriminated that case from such a case as the one in hand.

Chapman v. Stoneman, 63 Cal. 490, does not seem to us to be in point. It was simply held in that case that the governor had authority and jurisdiction to investigate questions of misconduct on the part of the state board of prison directors. There is no intimation in the case anywhere of any charge of bias or prejudice on the part of the governor. *Allen v. Reilly*, 5 Nev. 452, cited on page 8 of respondents' brief, is evidently a miscitation, as the case is not to be found in that volume. It was probably taken from the citations given by 12 Am. & Eng. Enc. Law to sustain the text announced by that court, which we commented on above; but the author was mistaken in the citation. *Pearson v. Hopkins*, 2 N. J. Law, 181, was a challenge to a judge who had acted in the circuit court, and had overruled a motion of the defendant for a nonsuit, and it was held that this did not disqualify him from sitting in the case on appeal, the court rightfully taking the view that, if the expression of an opinion by a judge on the law disqualified him, he would be disqualified from trying a case upon the granting of a motion for a new trial. The same was substantially the holding in *Pierce v. Delamater*, 1 N. Y. 17, and the same, in substance, was decided in *Waters-Pierce Oil Co. v. Cook*, 6 Tex. Civ. App. 573 (26 S. W. 96). We do not think the other cases cited in respondent's brief, and commented on therein, are in point. We will, however, especially notice the two which are nearest in point. In *People v. Board of Police Com'rs*, 32 N. Y. Supp. 18, it was held that it was not error for a commission-

er to sit on the trial of charges against a policeman after he had been challenged on the ground that he had prejudged the case, and did not intend to give the policeman a fair trial, it not being claimed that the commissioner had any interest in the matter, or was disqualified by any statute. This case was based on the doctrine of necessity, and it was asserted by the court that, if the judges who were challenged were thereby rendered disqualified to try the case, the relator could secure himself in office, because it would leave the board without a majority of its members to render a judgment or make a determination. And in *People v. Common Council of City of Auburn*, 33 N. Y. Supp. 165, the decision is substantially the same as the one noticed above, where the court quoted approvingly the announcement by the court in *In re Ryers*, 72 N. Y. 1 (28 Am. Rep. 88),

“that it must be the law from these cases that, where the judicial power has been confided to one judge, and, if he should fail to act, there would be no means of proceeding in the matter, though interested, he may take such cognizance of the case as is absolutely necessary, so far that the party shall not be without remedy.”

But the two last cases, as far as they did go on the subject—and they may be conceded to come nearer sustaining respondents' contention than any other cases cited—were overruled in *People v. Board of Trustees of Village of Saratoga Springs*, 39 N. Y. Supp. 607, where it was held that a village trustee who prefers charges against a village officer is disqualified to sit as a member of the board of trustees on hearing of the charges, as otherwise he would act as both accuser and judge; especially disapproving *People v. Common Council of City of Auburn*, *supra*, and further holding that the removal of a village officer by the board of trustees is illegal where the charges were preferred by one of the trustees who sat on the hear-

ing, and without whom a quorum of the board would not have been present. And noticing the doctrine of necessity above spoken of, it was held that the exception to the rule that judicial officers shall not act in a matter in which they are interested, in order to prevent a failure of justice, does not apply so as to permit a disqualified member of a board, the powers of which may be exercised by a majority of its members, to take part in a judicial proceeding by the board. This case seems to us to be a parallel case with the one at bar, so far as this question is concerned. The court makes the announcement that one of the rights secured to an accused person by the law of the land is that his accuser shall not be at the same time his judge.

"Cases are to be found," say the court in this case, "where judicial officers, or officials acting in a judicial capacity, have been permitted to act, notwithstanding the disqualification of interest; but I think, without exception, they have all been cases where, unless such officer was permitted to act, there would have been a failure of justice, for the reason that there was no other person who could act. They have been confined to cases where the judicial tribunal or body to act consisted of but a single person, and there was no other tribunal or officer before whom the proceedings could be taken, and the officer was permitted to act from necessity."

It is conceded by the counsel for the respondents that this case overrules the former cases reported in the New York Supplement, but they insist that the reasoning of the former cases is better, and that the decisions are more in consonance with the adjudicated cases. But we cannot agree with them on this proposition. The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts; in fact, the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running through

and pervading the whole system of judicature, and it is the popular acknowledgment of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice, and their proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest. The learned and observant Lord Bacon well said that the virtue of a judge is seen in making inequality equal, that he may plant his judgment as upon even ground. Caesar demanded that his wife should not only be virtuous, but beyond suspicion; and the state should not be any less exacting with its judicial officers, in whose keeping are placed not only the financial interests, but the honor, the liberty and the lives of its citizens, and it should see to it that the scales in which the rights of the citizen are weighed should be nicely balanced, for, as was well said by Judge BRONSON in *People v. Suffolk Common Pleas*, 18 Wend. 550:

“Next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge.”

The reason that financial interest or near relationship to a litigant is held to be sufficient to recuse a judge is that it is to be presumed that self-interest or natural affection will unconsciously prejudice a judge, and deprive the litigant of a fair trial. This presumption in certain cases may or may not be justified by the truth, but so solicitous is the law to maintain inviolate the principle that every litigant shall be secure in his right to a fair trial that he is accorded the benefit of the presumption. But what does a presumption amount to compared with the admitted fact that the judge will not accord the litigant a fair trial; that he will vote to remove him from his office, no matter what the

evidence may be? And this, so far as this case is concerned, the demurrer to the affidavit having been sustained, must be considered the fact. To compel a litigant to submit to a judge who has already confessedly prejudged him, and who is candid enough to announce his decision in advance, and insist that he will adhere to it, no matter what the evidence may be, would be so farcical and manifestly wrong that it seems to us that the idea must necessarily be excluded by the very expression "administration of justice." As sustaining this view, the following cases, cited by appellant, are found to be in point: *Barnett v. Ashmore*, 5 Wash. 163 (31 Pac. 466); *Moses v. Julian*, 84 Am. Dec. 114; *Stockwell v. Township Board*, 22 Mich. 341; *Oakley v. Aspinwall*, 3 N. Y. 547; *Williams v. Robinson*, 6 Cush. 334. A review of the cases cited by appellant is made by the respondents for the purpose of showing that the facts decided in them are not similar to the facts in the case at bar, and, while it is true that in some of the cases financial interest was claimed, yet, as a rule, the decisions are not based upon that ground, but upon the broad ground that the citizen is entitled to a judge who is absolutely impartial. The merits of the case are not now before us. The permanent writ will issue.

SCOTT, C. J., and ANDERS, GORDON and REAVIS, JJ.,
concur.

19	20
19	31
19	20
125	604

[No. 2609. Decided February 24, 1898.]

BENJAMIN HALLAM, *Respondent*, v. PHILIP TILLINGHAST, *Receiver*, AND THE COMMERCIAL NATIONAL BANK, *Appellants*.

APPEAL—AUTHORITY OF ATTORNEY TO TAKE—SETTLEMENT OF STATEMENT OF FACTS—POWER OF FORMER JUDGE TO CERTIFY—COLLECTIONS BY BANK—RELATIONS OF PARTIES.

A receiver of an insolvent bank, who appears of record also as attorney for the bank itself, may prosecute an appeal for the bank, when no question as to his authority to appear as such attorney has been raised in the lower court.

The settlement and certifying of a statement of facts by the court is a judicial act, which can be exercised only by one vested with judicial power; hence, the act of March 8, 1893 (Bal. Code, § 5061), which authorizes and requires a judge whose term of office has expired to settle statements of facts in actions previously tried before him, is invalid and unconstitutional, as attempting to impose judicial functions on one whose judicial powers, as prescribed under the constitution, have terminated with the expiration of his term of office. (ANDERS, J., dissents.)

The collection by a bank of a draft placed in its hands for that purpose establishes the relation of debtor and creditor, and not one of trust, between it and the party delivering the draft, although the delivery may have been made for the purpose of collection only, without any deposit, or agreement to deposit any part of the proceeds of the draft. (GORDON, J., dissents.)

Appeal from Superior Court, Pierce County.—Hon. JOHN C. STALLCUP, Judge. Reversed.

Tillinghast & Pritchard, for appellants.

Lueders & Leo, for respondent.

The opinion of the court was delivered by

SCOTT, C. J.—The respondent moves to dismiss this cause on the ground that no appeal was taken by the bank, the contention being that the receiver could not appeal for the

Feb. 1898.] Opinion of the Court — SCOTT, C. J.

bank or independent of it; but, without considering the last question, it is shown by the record that the bank appeared in the action by Mr. Tillinghast, who was also receiver, as its attorney, and his authority to so appear was not questioned in the lower court and consequently it can not be questioned here. It follows that he could take an appeal for the bank as well as in his own behalf as receiver. It is contended also that no sufficient appeal bond was given. It appears that a cost bond was filed and also a separate stay bond. The decision with reference to the appeal on the part of the bank disposes of the question as to the cost bond and that was sufficient to confer jurisdiction on this court. The motion to dismiss is denied.

The respondent also moves to strike the statement of facts, on the ground that the same was settled by the judge after his term of office had expired, which calls in question the validity of § 12 of the act relating to the settlement of statements of facts, approved March 8, 1893 (Laws of 1893, p. 116, § 12; Bal. Code, § 5061), which authorizes and requires a judge whose term of office has expired to settle statements of facts in actions previously tried before him, it being contended that these provisions of said act are in conflict with §§ 1 and 5, art. 4, of the constitution.

The precise question raised here has never been expressly passed upon by this court, although the effect or result of several cases is to decide the principle in favor of the respondent. In *State ex rel. Hinchey v. Allyn*, 7 Wash. 285 (34 Pac. 914), which was an application for a mandamus to compel an ex-judge to settle and certify a statement brought under the act, Laws 1893, p. 6, the writ was refused on the ground that the law did not purport to compel the judge to act.

Prior to these laws, in *Faulconer v. Warner*, 2 Wash.

525 (27 Pac. 274), it was held that an ex-judge had no authority to settle a statement in a cause which had been tried before him. The inference might be drawn from the discussion of the case that the legislature could empower him to settle a statement, but the question was not involved nor expressly ruled upon. But it was held in that case that the action of the judge in settling a statement was judicial in its nature.

In *Gunderson v. Cochrane*, 3 Wash. 476 (28 Pac. 1105), it was held that the court has authority to settle a statement where the term of office of the judge who tried the cause has expired.

A number of decisions elsewhere have been called to our attention upon this subject, and in many instances the power of a former judge to settle a statement, after his term had expired, has been sustained, but in nearly every instance it was under the view that the settlement of the statement is a ministerial act, and not a judicial one, or on the principle that the finding of the trial judge as to what took place is conclusive. That it is essentially judicial in our practice is beyond question. In *Van Lehn v. Morse*, 16 Wash. 219 (47 Pac. 435), where a controversy arose between the appellant and the judge who tried the cause over certain matters which it was claimed took place at the time of the trial, this court, upon an application by the appellant to compel a settlement of the statement accordingly, appointed a referee to take testimony and certify it to this court, which was done, and the contention of the appellant was sustained. No such practice could be had on the theory that the action of the judge in such matters is ministerial, nor could it be harmonized with the proposition that an ex-judge might be authorized, but could not be compelled, to act, consequently we are bound to follow our former hold-

Feb. 1898.] Opinion of the Court—Scott, C. J.

ings to the effect that the action is judicial in its nature; it would follow also that if an ex-judge could act at all he could be compelled to act, for the practice of permitting a judge to proceed or not as he should see fit, or to undertake to proceed and then discontinue, could not be tolerated for a moment. The question now to be expressly determined is whether the legislature could empower and obligate an ex-judge to act as a court after his term of office has expired. Of course, while taking such an office has some of the features of a contract, that would no longer apply, for where judges were elected after this act was passed they could be held to have assumed all the burdens of the office, and the only question is as to the constitutionality of the statute. Section 1, article 4, vests the judicial power of the state in the supreme and superior courts, etc., and § 5 provides that the term of office of a judge of the superior court shall be four years, consequently when his term of office has expired he is no longer a judge and clearly can no longer exercise judicial functions. It follows that the act in this respect is invalid, being in direct conflict with the constitution. The statement of the question decides it under these provisions and our former holdings.

No hardship can result, for the statement can be settled by the court. The identity of the judge is lost in the court, and the court continues, although the term of a judge is ended. Where a controversy arises the ex-judge can be subpoenaed and compelled to testify.

In the older practice, in many jurisdictions, the action of the judge who tried a cause in settling a statement could not be controlled. His own decision as to what took place was final; but that does not obtain here, nor is the difficulty of determining what did take place as great as formerly, owing to the fact that stenographers are usually employed now to take down the proceedings of the trial in de-

tail. The motion to strike the statement is granted. As this was a question of practice which seems to have been fully briefed, and, the court having reached a conclusion, it was thought best to decide it at this time, although this case could as well have been disposed of without doing so. If decided now, owing to the lapse of time since the last election of judges, it will not be likely to affect other pending appeals injuriously, but if postponed it might come up again soon after another election and affect a good many.

As to the merits the question is left, whether the judgment rendered in the lower court is not contrary to the findings. The action was brought to recover the amount of a draft payable in Oregon, collected by the bank for the plaintiff while it was doing business. The material findings are as follows:

“That thereafter, to-wit: on the 14th day of October, 1895, plaintiff delivered said draft to the above named defendant Columbia National Bank for collection.

“That on the 18th day of October, 1895, said defendant, the Columbia National Bank, by its agent, had collected for plaintiff from said treasurer of said company, said sum of four hundred seventy-eight and 75-100 dollars on said draft.

“That the said Columbia National Bank had in its hands money in excess of the said sum of \$478.75 when said bank suspended, which went into the hands of said receiver.

“That said plaintiff delivered said draft to said bank for collection only and for no other purpose.

“That plaintiff never deposited or agreed to deposit the proceeds of said draft or any part thereof with said bank.”

In finding two it was found that the bank became insolvent on October 24, 1895, a few days after the draft was collected. Do the findings negative a special agency or trust as to the proceeds of the draft? If they do, the judgment cannot be sustained. In *Bowman v. First National Bank*, 9 Wash. 614 (38 Pac. 211, 43 Am. St. Rep. 890),

Feb. 1898.] Opinion of the Court—SCOTT, C. J.

a very similar question was decided contrary to the contention of the respondent here, although some stress was laid upon the fact there that the bank, in addition to making the collection, was directed to remit the proceeds, and that following the custom the same would be remitted in the shape of a draft or certificate of deposit, and not in specie. It was stated, however, that

“ . . . the transaction, even if uninfluenced by any action of the respondents after the collection was made, would have established between them and the defendant bank the relation of creditor and debtor, and not that of *cestui que trust* and trustee.”

It was also stated that the custom of banks in regard to making collections and remitting therefor, was so well established and so universally known that the courts are required to take judicial notice of the fact that a bank, when it makes a collection, never, unless specially directed so to do, remits the specie collected, but remits in the form of a draft or certificate. *Blake v. State Savings Bank*, 12 Wash. 619 (41 Pac. 909), involved a somewhat different question, but the discussion covered the principle in this case and in effect decided it adversely to the respondent. The principle there in issue, under one view of the case, being a wrongful conversion of the funds; but it was held to establish simply the relation of a debtor and creditor on the ground that the money converted had been commingled with other funds of the bank, and had lost its identity so that a trust could not be established. The respondent undertakes to distinguish this case from the two mentioned, because there was no direction to remit the proceeds, but that the bank was to hold the money until the plaintiff called for it. There is no contention that there was any agreement that the particular money should be preserved in specie. In fact, it must be presumed, under the custom stated, that the particular money paid to satisfy the draft

was never received by the bank here, as, following the custom, the draft would be sent by the bank to its correspondent where the draft was payable, for collection, and, when paid, under such custom the specie would not be remitted, but the bank sending the draft would be credited with the amount merely, and such matter left for future settlement in the balancing of accounts. The respondent was bound to know this custom. The fact that he never specially agreed to deposit the proceeds of the draft with the bank made no difference. If he wanted to except it from the usual custom there should have been an agreement that the specific money should be set aside for him, or disposed of in some particular way, or, at least, that upon the payment of the draft a like amount should be segregated from the general funds of the bank and kept for him, thus keeping the proceeds in a special substituted form. Had this been done prior to the insolvency of the bank no doubt a trust would have resulted as against the receiver, if the particular proceeds in either the original or substituted form came into his possession. There is no equity in a rule giving such claims as the plaintiff's a preference over the general creditors. He trusted the bank under the general custom, in depositing the draft for collection, much the same as any other general depositor trusts a bank. The finding that the bank had a sufficient amount of money to discharge this obligation at the time the receiver took possession negatives the idea that it had as a separate trust the particular money collected, even if the custom were not regarded. Nor does it appear, but there may have been other claims against the bank like this one of the plaintiff's, if it was regarded as a trust fund, more than sufficient to have exhausted its assets. We attach no importance to these latter suggestions, however. The authorities upon these questions are somewhat conflicting, as stated in

Feb. 1898.] Opinion of the Court—SCOTT, C. J.

Bowman v. First National Bank, supra. We have examined all the cases cited by both parties, and think that the decided weight is in favor of the appellant's contention. Following the custom in such cases, the money, upon making a local collection even, would be placed with the general moneys of the bank, and this would follow as well from a single transaction as from many, and when the creditor should call for payment, the particular moneys would not be handed out to him, but he would be required to check against the general funds of the bank, or to return the certificate of deposit if one had been issued to him. He would be paid from the general fund in either event under such custom. The most applicable case to support his contention cited by the respondent is that of *McLeod v. Evans*, 66 Wis. 401 (28 N. W. 173, 214, 57 Am. Rep. 287), but that case was expressly overruled by the court in *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237 (58 N. W. 383). In support of the general proposition that only the ordinary relationship of debtor and creditor is established by substantially the facts here, see *Akin v. Jones*, 93 Tenn. 353 (27 S. W. 669, 42 Am. St. Rep. 921); *Bank of Commerce v. Russell*, 2 Dill. 215; *Anheuser-Busch Brewing Ass'n v. Clayton*, 56 Fed. 759; *Muhlenberg v. Northwest Loan & T. Co.*, 26 Ore. 132 (38 Pac. 932); *Tinkham v. Heyworth*, 31 Ill. 519; *Illinois Trust & Sav. Bank v. First National Bank*, 15 Fed. 858; *Frelinghuysen v. Nugent*, 36 Fed. 229; *Philadelphia National Bank v. Dowd*, 38 Fed. 172; *City of Spokane v. First National Bank*, 68 Fed. 982; *Little v. Chadwick*, 151 Mass. 109 (23 N. E. 1005).

There is no fraud found in this case on the part of the bank, if that would make any difference. Also, the draft deposited was the plaintiff's own property, and not held by him in trust for another. It is not contended that the evi-

dence would warrant any more favorable findings for him than the ones made, if we were at liberty to consider the testimony. In fact, there was a strong contention by the appellants otherwise. It follows that there was no trust established, and that the judgment must be reversed, and the cause remanded with instructions to enter a judgment in favor of the appellants as contended.

DUNBAR and REAVIS, JJ., concur.

ANDERS, J., (dissenting).—I fully concur in the foregoing opinion of the Chief Justice on the merits of this case, but not in the ruling on the motion to strike the statement of facts. Conceding that the act of determining what transpired during the trial of a cause is in its nature judicial, it nevertheless seems to me that it is not beyond the power of the legislature to authorize a judge, after going out of office, to state and certify what facts were disclosed, and what questions were decided, at the trial. In such cases all that is done by the judge is to complete the history of the trial had, and to put in the required form the facts found during his term of office. I do not think that this court, in the cases heretofore decided, and cited in the opinion, intended to, or did in fact, go to the length of holding a statute like that now under consideration unconstitutional. Nearly all of these cases were decided before this statute was enacted. Other states have constitutions like ours prescribing that the judicial power shall be vested in certain specified courts, yet in several of them it has been held, after due consideration, that judges who presided at trials might lawfully certify bills of exceptions, after the expiration of their term of office. See *State v. Barnes*, 16 Neb. 37 (19 N. W. 701); *Davis v. Menasha*, 20 Wis. 194; *Hale v. Haselton*, 21 Wis. 325; *Galbraith v. Green*, 13 Serg. & R. 85; 2 Spelling, Extraordinary Relief, § 1412; *Johnson v. Higgins*, 53 Conn. 236 (1 Atl. 616).

Feb. 1898.]

Dissenting Opinion — GORDON, J.

It is impossible for the court, as contra-distinguished from the judge, to settle or certify a bill of exceptions or statement of facts, and our legislature has said, in unmistakable terms, that the judge, or person, before whom a cause is tried shall perform that duty. The legislature having prescribed the procedure, I think the court should follow it. In my opinion the motion to strike the statement should be denied.

GORDON, J., (dissenting).—I concur in the disposition made of the motions, and also in all that is said upon the questions of practice, but dissent from the conclusion reached by my brethren in regard to the merits. I think the evidence conclusively shows that a trust relation was created between the bank and respondent, which continued until the appellant went into possession, that the proceeds of the draft went into the hands of appellant, and inasmuch as he is not in law a *bona fide* holder for value without notice, there is nothing to prevent the trust character being impressed upon the funds in his hands. Upon the facts the case differs widely from *Bowman v. First National Bank*, 9 Wash. 614 (38 Pac. 211), where the proceeds of the collection were to be remitted to the party who was seeking to impress the trust, and they were remitted according to the usual custom of banks, while here it was the duty of the bank to hold the proceeds of the collection until called for by respondent. I think the learned trial judge reached a correct conclusion, and that the judgment should be affirmed.

[No. 2683. Decided February 24, 1898.]

19 80
125 004

JOHN B. RAUH *et al.*, *Appellants*, v. JOHN D. SCHOLL *et al.*, *Respondents*.

JUDGES — POWERS OF SUCCESSORS — SETTLEMENT OF STATEMENT OF FACTS — RENDITION OF JUDGMENT — EVIDENCE — TRANSACTIONS WITH DECEDENT.

The settlement of a statement of facts by a judge after his term of office has expired is not ground for striking the statement, when it has also been certified by the successor of the judge who tried the cause.

Where, after verdict, a motion for a new trial has been interposed, the rendition of judgment at the time of deciding such motion is timely.

Where the term of a trial judge has expired judgment may properly be rendered by the succeeding judge.

A party to a transaction is not barred from testifying in regard thereto by the death of one of the adverse parties, when there is no attempt to prove any conversation or transaction with the deceased and the testimony is confined to transactions with one of the adverse parties still living.

Appeal from Superior Court, Pierce County.—Hon. W. H. H. KEAN, Judge. Affirmed.

Lueders & Leo, for appellants.

G. W. H. Davis (*Campbell & Powell*, of counsel), for respondents.

Per Curiam.—This is the second time this action has been before this court. See 12 Wash. 135 (40 Pac. 726), where a judgment in favor of defendants was reversed, and the cause remanded for a new trial, which was had, resulting again in favor of defendants, and plaintiff takes this appeal. The respondents move to strike the statement of facts on the ground that the same was settled by the judge after his term of office had expired. The motion would

Feb. 1898.]

Opinion Per Curiam.

be well taken under *Hallam v. Tillinghast*, recently decided, *ante*, p. 20, were it not for the fact that in this case appellants also procured a certificate of the succeeding judge, so it was in effect settled before both the ex-judge who tried the cause and his successor in office.

A great many points have been raised on this appeal. The first one is that the motion for a new trial should have been granted on the ground that the judgment was not rendered within the time prescribed by law, and also because it was rendered by a judge who did not try the cause. It appears that the judgment was rendered at the time the motion for a new trial was decided, and we have heretofore held that where the term of a trial judge had expired judgment could be rendered by the succeeding judge. It is further contended that the court erred in allowing defendant to testify to the transaction between himself and the plaintiff on the ground that one of the plaintiffs was dead. But there was no attempt by the defendants to prove any conversation or transaction had with the deceased.

It is also contended that there was no evidence of a surrender of the lease, and further that a husband alone could not accept the surrender. But we think there was ample proof of a surrender of the premises by the lessees to the plaintiffs, and an acceptance of the same, and sufficient testimony introduced by the plaintiff to connect the deceased wife with it to sustain the verdict.

We have examined all the other questions raised with relation to the admission and rejection of evidence, and do not think any of them are well taken. It is alleged also that the instructions are erroneous. It is questionable whether we could pass upon them at all, it not clearly appearing what instructions were given and what were refused. We have read the ones complained of, however, and see no error therein.

The judgment is affirmed.

[No. 2800. Decided February 24, 1898.]

CARLSON BROS. & COMPANY, *Appellant*, v. A. T. VAN DE VANTER, *as Sheriff of King County, Washington, Respondent*.

APPEAL—EXTENSION OF TIME FOR FILING BRIEFS—JUDGMENT OF DISMISSAL—FAILURE TO FURNISH SECURITY FOR COSTS—FOREIGN WITNESSES—MILEAGE.

An extension of time given appellant by stipulation, in which to file his brief, would not excuse respondent from filing his answering brief within the time prescribed by the rules of court, unless an extension of time had also been accorded the latter by stipulation.

A judgment dismissing an action is warranted, when plaintiff has failed to comply with an order of the court requiring him to give security for costs on the ground of non-residence.

A witness from outside the state, who attends a trial for the purpose of testifying in the case, is entitled to mileage within the borders of the state.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

Stiles & Harvey, for appellant:

For the first time the question is presented to this court, will witnesses residing out of the state be allowed claims for mileage? We believe the correct rule to be that a party should be allowed the fees and mileage of witnesses who attend the trial of an action, either upon the service of the subpoena or voluntarily, within the jurisdiction of the court to issue a subpoena. *Stern v. Herren*, 101 N. C. 516; *Sapp v. King*, 66 Tex. 570; *Spaulding v. Tucker*, 2 Sawy. 50; *Wooster v. Hill*, 44 Fed. 819; *Sloss Iron, etc., Co. v. South Carolina & G. R. Co.*, 75 Fed. 106; *In re Vernon*, 36 Fed. 115; *Anon*, 5 Blatch. 134; *Den-*

Feb. 1898.] Opinion of the Court—DUNBAR, J.

nis v. Eddy, 12 Blatch, 198; *Russell v. Ashley*, 1 Hempst. 546. The court has no jurisdiction to issue a subpoena beyond the limits of the county unless the witness resides within twenty miles of the place of trial. Code Proc., § 1650 (Bal. Code, § 5995); *State, ex rel. Timm, v. Trounce*, 5 Wash. 804.

Bausman, Kelleher & Emory, for respondent:

In support of the rule that mileage can be recovered for the whole distance traveled by witnesses within and without the jurisdiction of the court, counsel cite *Prouty v. Draper*, 2 Story, 199; *Whipple v. Manufacturing Co.*, 3 Story, 84; *Hathaway v. Roach*, 2 Woodb. & M. 63; *United States v. Sanborn*, 28 Fed. 299.

The opinion of the court was delivered by

DUNBAR, J.—The appellant, upon the argument of this case, moved to strike the brief of the respondent from the files for the reason that the same had not been served according to the rules of this court, which motion was sustained at the time. The respondent asserted, and the record shows, that the time for the filing of appellant's brief had been extended by stipulation, but we are unable to say that this gives any right to the respondent to ignore the law in regard to the time of filing his brief. If he desired further time he should have pursued the course which the appellant pursued and obtained a stipulation, or have attempted at least to have obtained a stipulation, and, had he failed in this, then he would have known that his brief must be prepared and served within the time required. On the merits, however, disregarding the respondent's brief and considering only the brief of the appellant and the record in the case, we think the appeal is without merit. This was an action prosecuted against the respondent as

sheriff of King county to recover damages for the wrongful conversion of certain personal property, alleged to belong to the appellant, of the alleged value of \$650. Upon the day appointed for a trial the appellant was not ready to sustain his complaint by testimony, and the court, as asserted by the appellant, dismissed the same for want of prosecution, and it is urged that the court abused its discretion in so doing. But, in addition to the fact that no exception was taken to the ruling of the court on this proposition, the record further shows that the appellant (who was plaintiff below) had neglected to comply with the order of the court in regard to costs, the court having adjudged that the plaintiff should make provision for costs on the ground of non-residence. The judgment of the court is as follows:

"This cause coming on to be heard duly and regularly, on this 24th day of June, 1897, the defendant being present in person and by his attorneys, Richard Winsor and Bausman, Kelleher & Emory, and the plaintiff being present by its attorneys, Condon & Wright, and a request for a continuance having been made on behalf of said plaintiff, but no formal showing having been made therefor, and it appearing further that heretofore an order was duly made, commanding said plaintiff to give security for costs, on the ground of non-residence, and it further appearing that said plaintiff has failed to comply with the said order, and the attorneys for the defendant having resisted said formal request for a continuance in open court, and said plaintiff having failed and neglected to produce any testimony or proof whatsoever in support of the allegations of its complaint, and the defendant, by his counsel, having announced himself ready for trial,

"Now, therefore, the court being fully advised in the premises, it is hereby

"ORDERED AND ADJUDGED that the foregoing action be dismissed by the court for lack of prosecution and for failure to comply with the court's order requiring security for costs."

The record further shows that at the date of the trial, which was a date stipulated by the attorneys for the respective parties, there was no objection on the part of the counsel for the defendant to allowing the counsel for the plaintiff sufficient time to make a showing to sustain their motion for a continuance, but no showing was made, and it was conceded that no showing could be made at that time, and the statements which were made to the court were the purest hearsay. But in any event, it would have been within the power of the court to have dismissed this action for the other reason assigned in the judgment, and there is no showing made, or attempted to be made, to justify the failure of the plaintiff in that respect.

The only other question in the case, and the only one which is properly here, is as to the mileage allowed the witness Nasset. It appears from the record that the witness lived at Grant's Pass, in Oregon, and the court allowed him mileage from Kalama, Washington, to the place of trial, and one day's attendance. It is the contention of the appellant that mileage cannot be allowed a witness for any greater distance than twenty miles, that being the distance which he is compelled to go in answer to a subpoena. We have examined the authorities on this proposition, and find them conflicting, so that we feel at liberty to lay down a rule governing this question in this state which commends itself to us as being right. We think it has been almost, if not entirely, the uniform practice of the trial courts to allow witnesses their mileage within the borders of the state whenever it was made to appear to the court that the witness attended the trial for the purpose of testifying in the case. That rule we think is founded in fairness and should be followed. We therefore hold that the court did not commit error in allowing the mileage complained of.

The judgment will be affirmed, the respondent to recover the costs of this appeal with the exception of the cost of the respondent's brief.

SCOTT, C. J., and ANDERS, GORDON and REAVIS, JJ.,
concur.

[No. 2791. Decided February 25, 1898.]

THE STATE OF WASHINGTON, *Respondent*, v. LOUIS
BOHN, *Appellant*.

ASSAULT WITH INTENT TO COMMIT CRIME—SUFFICIENCY OF INFORMATION.

Under the rule that it is not essential to use the words of the statute if others of like import are used, an information charging defendant with making an unlawful and felonious assault is equivalent to charging it as made "in a rude, insolent and angry manner."

When an information alleges a consummated assault in the attempt to commit a crime, a further allegation that defendant had the present ability to carry the attempt into execution is surplusage and not necessary to be alleged.

Appeal from Superior Court, Pierce County.—Hon.
W. H. H. KEAN, Judge. Affirmed.

J. F. O'Brien, and *C. P. Bennett*, (*C. N. Warner*, of counsel), for appellant.

A. R. Titlow, Prosecuting Attorney, and *Hugh Farley*, for The State.

Per Curiam.—Appellant was found guilty of an assault with intent to commit robbery under an information, the body of which is as follows:

Feb. 1898.]

Opinion Per Curiam.

“Louis Bohn and R. H. Bowman are accused by the prosecuting attorney of the county of Pierce, state of Washington, by this information, of the crime of assault with intent to commit robbery, committed as follows: The said Louis Bohn and R. H. Bowman on the 26th day of March, eighteen hundred and ninety-seven, at the county of Pierce, and state of Washington, and within one year prior to the filing of this information, did then and there together unlawfully and feloniously assault one Peter Olsen; then and there being, by striking, beating and wounding the said Peter Olsen in the back of the head with a steel chisel, with intent then and there and thereby to unlawfully, feloniously, forcibly and by violence take from the person of said Peter Olsen certain articles of value, to-wit: Money. Contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Washington.”

He contends that the information should have charged an assault in the language of the statute, viz.: “In a rude, insolent and angry manner,” and allege a present ability to carry such attempt into execution. Penal Code, § 20 (Bal. Code, § 7055). We have repeatedly held that it was not essential to use the words of the statute if others of like import are used, and the clause charging an unlawful and felonious assault was at least equivalent to charging it in a rude, insolent and angry manner. As to the ability to carry it into execution, the information charges a consummated assault or battery and was sufficient in that respect. *State v. Ackles*, 8 Wash. 462 (36 Pac. 597); *State v. Keen*, 10 Wash. 93 (38 Pac. 880).

Affirmed.

[No. 2811. Decided February 25, 1898.]

THE CITY OF SEATTLE, *Appellant*, v. CHIN LET, *Respondent*.

CONSTITUTIONAL LAW — PROHIBITION OF LOTTERIES — MUNICIPAL CORPORATIONS — PENALTIES FOR MISDEMEANORS — PROSECUTIONS IN NAME OF CITY — SCOPE OF PENAL ORDINANCES.

The constitutional provision (art. 2, § 24) that "the legislature shall never authorize any lottery" is mandatory and self-executing and prohibitory of lotteries for any purpose, charitable or otherwise.

The provision in Penal Code, § 139 (Bal. Code, § 7259), permitting lotteries for charitable purposes, although enacted prior to the framing of the constitution, falls within the constitutional prohibition against lotteries, and is therefore invalid.

Where a state law merely prescribes the maximum penalty for the punishment of misdemeanors at a fine of \$500 or imprisonment for not more than one year and specifies no minimum penalty, a city ordinance fixing a minimum penalty of \$20 for the punishment of like offenses does not conflict with the constitutional provision that city charters shall be subject to the control of general laws, nor with the charter provision that punishment for violation of the penal ordinances of the city "shall in no case exceed the punishment provided for by the laws of the State of Washington for misdemeanors."

Prosecutions for the violation of municipal ordinances may properly be conducted in the name of the municipality, as the constitutional provision requiring all prosecutions to be conducted in the name of the state applies only to those instituted on account of the violation of the general laws of the state, and has no application to the infraction of municipal ordinances.

Where a city is by its charter expressly authorized to provide by ordinance for the punishment of all practices dangerous to public safety or health and make all regulations necessary for the preservation of public morality within its limits, it is not restricted in defining offenses of that character to the exact scope of state laws upon like subjects.

Appeal from Superior Court, King County.—Hon. ORANGE JACOBS, Judge. Reversed.

Feb. 1898.] Opinion of the Court—GORDON, J.

John K. Brown, F. B. Tipton, and Z. B. Rawson, for appellant.

William Parmerlee, (Hart & Parmerlee, of counsel), for respondent:

The ordinance disregards a statutory exception and does not contain same. *Canton v. Nist*, 9 Ohio St. 439; *Thompson v. Mt. Vernon*, 11 Ohio St. 688.

The ordinance increases the minimum penalty provided by state law, and conflicts with provisions of the state constitution and of the city charter of Seattle. *Town of Petersburg v. Metzker*, 21 Ill. 205; *Ex parte Solomon*, 91 Cal. 440; *In re Ridenbaugh*, 49 Pac. 12; *Heinssen v. State*, 23 Pac. 995; *In re Ah You*, 25 Pac. 974 (22 Am. Rep. 280, 11 L. R. A. 408); *Black, Interpretation of Laws*, 116 *et seq.*

The ordinance attempts to enlarge signification of words of our statute law, making that unlawful which, without the enlargement, would be lawful. *Kennedy v. People*, 49 Pac. 373; *Bernheimer v. Leadville*, 14 Colo. 520; *Davenport v. Rice*, 75 Iowa, 74 (9 Am. St. Rep. 454); *Emmons v. Lewiston*, 132 Ill. 380 (22 Am. St. Rep. 540, 8 L. R. A. 328); *Chicago v. Hulbert*, 118 Ill. 636 (59 Am. Rep. 400).

The opinion of the court was delivered by

GORDON, J.—Respondent was prosecuted in the municipal court, of the city of Seattle, for violating the ordinance of that city relating to lotteries. The section of the ordinance in question is as follows:

“Section 11. Whoever shall maintain or run, or be in any manner connected with, any lottery or any establishment or business, by whatever name it may be known, wherein any property is sold or disposed of by chance, or whoever shall, within the city, sell or dispose of any lottery ticket or share either for religious or secular purposes, or

any chance, or any article or thing entitling or purporting to entitle, the purchaser to any chance, or whoever shall, within said city, sell or dispose of any package or article purporting to contain a prize, or where, as an inducement to purchase, it is held out that such article or package may contain a prize or may entitle the purchaser to some article or thing of value not directly contemplated and known in the purchase shall, on conviction, be fined not less than twenty dollars nor more than one hundred dollars for each offense."

From a judgment of conviction he appealed to the superior court and therein filed a general demurrer to the complaint. The superior court sustained the demurrer and discharged him and the city has appealed.

The first contention of the respondent is that the ordinance in question disregards a statutory exception and does not contain the same. Section 139 of the Penal Code (Bal. Code, § 7259) upon the subject of lotteries contains an exceptive provision as follows:

"Provided, that nothing herein contained shall apply to any lottery for charitable purposes."

Appellant urges that this proviso conflicts with art. 2 of § 24 of the constitution of the state, which is as follows: "The legislature shall never authorize any lottery . . ." The proviso in § 139, *supra*, must be interpreted by the same rule that would govern if it had been enacted after the adoption of the constitution. The language of the constitution is mandatory and the provision is self-executing. The question naturally suggests itself, if lotteries for charitable purposes may be lawfully conducted and permitted, why may not lotteries for any other purpose? We think that the constitutional provision admits of no exception in favor of lotteries for charitable purposes or for any other purpose.

Feb. 1898.] Opinion of the Court — GORDON, J.

2. The next position advanced by respondent, in support of the demurrer, is that the ordinance increases the minimum penalty provided by the state law for the same offense, and conflicts with the charter of the city and the constitution of the state. Section 36 of article 4 of the charter of 1890 provides that the council shall have power by ordinance,

“To provide for the punishment of all disorderly conduct and of all practices dangerous to public safety or health, and to make all regulations necessary for the preservation of public morality, health, peace and good order within its limits, and to provide for the arrest, trial and punishment of all persons violating any ordinance of the city; but *such punishment shall in no case exceed the punishment provided for by the laws of the state of Washington for misdemeanors.*”

And the constitution (§§ 10 and 11 of art. 11) provides in substance that charters of cities or towns shall be subject to the control of general laws. It is contended that inasmuch as the minimum punishment provided for a violation of the ordinance is a fine of \$20, that it exceeds the minimum punishment prescribed by law (§ 139, *supra*), for the same offense. We think the position is not well taken. Section 301 of the Penal Code (Bal. Code, § 7435), provides that punishment for misdemeanors shall not exceed a fine of \$500, or imprisonment in the county jail for not more than one year. It fixes a maximum, but does not specify a minimum punishment, and the requirement of the charter is only that the punishment shall in no case “*exceed the punishment provided by the laws of the state of Washington for misdemeanors.*” *Seattle v. Pearson*, 15 Wash. 575 (46 Pac. 1053).

3. It is also urged by respondent that § 27 of art. 4 of the constitution, requires all prosecutions to be conducted in the name of the state of Washington, and therefore the

present action cannot properly be prosecuted in the name of the city of Seattle. We think the "prosecutions" referred to in § 27, *supra*, are prosecutions for the violation of the general laws of the state, and that that section does not apply to prosecutions for the infraction of town or city ordinances. *City of Davenport v. Rice*, 75 Iowa, 74 (39 N. W. 191, 9 Am. St. Rep. 454); *City of St. Louis v. Vert*, 84 Mo. 206; *City of Mankato v. Arnold*, 36 Minn. 62 (30 N. W. 305).

4. Lastly, it is urged that the ordinance attempts to enlarge the terms of a state law upon the subject of lotteries (139, *supra*), and to make that unlawful which is not unlawful under § 139. It is urged that the words of the ordinance, "be in any manner connected with a lottery," are not included in the state law upon the same subject, and that therefore the ordinance is invalid. The cases cited by respondent do not sustain his contention. In *Kennedy v. People*, 9 Colo. App. 490 (49 Pac. 373), it was held that the general statute of Colorado which authorizes towns "to license, tax, regulate, suppress and prohibit" *peddlers*, empowers them to exact a license from such persons only as are peddlers within the general signification of the word, namely, "a peddler is a trader who carries with him the goods which he sells," and that an ordinance attempting to enlarge the signification was to that extent void. The other cases cited are to the same effect, and they are not in point.

The charter of the appellant expressly authorizes the council to provide, by ordinance, for the punishment "of all practices dangerous to public safety or health," and "for the preservation of public morality" within its limits, subject only to the limitation that the punishment provided must not exceed that provided by the state law for misdemeanors.

We think that the city had authority to pass the ordinance in question, and that it was within the powers conferred by the charter and general law of the state. The reasoning of the respondent would lead to the conclusion that the council in drafting ordinances defining offenses committed within the limit of the city should be restricted to the particular offenses created by the general law of the state, and also to the particular words and terms used by the legislature in defining such offenses. We think the right of the city to enact the ordinance in question was in nowise affected by the existence of § 139, *supra*.

We regret that counsel for the city have not seen fit to furnish us any brief or argument, or cite any authorities upon any of the questions noticed in this opinion, excepting the first one discussed herein, and we have been put to the labor of hunting for the authorities. It is always unsatisfactory to a court to be obliged to determine important questions which are presented and discussed in the brief of one of the parties only. Questions determined while laboring under such a disadvantage ought not to be considered as decisive—at least not as to future cases in which the same questions may arise.

The judgment must be reversed, and the superior court directed to overrule the demurrer.

DUNBAR and ANDER, JJ., concur.

[No. 2817. Decided February 25, 1898.]

THE STATE OF WASHINGTON, *on the Relation of A. A. Denny, v. ROBERT BRIDGES et al., as the Harbor Line Commission of the State of Washington, AND CITY OF SEATTLE, Intervenor.*

TIDE LANDS — LEASE FOR PURPOSES OF NAVIGATION AND COMMERCE —
CONSTRUCTION OF CONSTITUTIONAL PROVISIONS.

Under art. 15, § 1, of the constitution, forbidding the sale of harbor areas and providing that they "shall be forever reserved for landings, wharves, streets and other conveniences of navigation and commerce," the term "commerce" must be construed as modified by the employment of the term "navigation," and the commercial use of such areas must be restricted to such as are aids to navigation; consequently the erection of structures on such areas for the "curing and canning of fish, maintaining a retail and wholesale fish market and the storage of ice for packing and handling fish," are not "conveniences of navigation and commerce," and hence not permissible under the constitution.

Under art. 15, § 2, of the constitution, authorizing the legislature to "provide general laws for the leasing of the right to build and maintain wharves, docks and other structures upon the areas mentioned in section one" of said article, the term "other structures" is governed by the rule of *ejusdem generis*, and falls within the *genus* "conveniences of navigation and commerce," and the statute (Laws 1897, p. 255, sec. 53; Bal. Code, sec. 2183), passed in pursuance thereof does not contemplate leases for any other purpose.

Original Application for Mandamus.

Blaine & DeVries, for petitioner.

Patrick Henry Winston, Attorney General, *Thomas M. Vance*, Assistant Attorney General, *John K. Brown*, and *F. B. Tipton*, for respondent.

The opinion of the court was delivered by

REAVIS, J.—Plaintiff applied to the board of state land commissioners to lease from the state the harbor area in front of certain tide lands of the city of Seattle owned by him. The uses for which he sought to lease the harbor area were as follows:

“For the purpose of receiving by rail and water, shipping by rail and water, fish and other food products of the water, curing and canning cod, salmon and other fish and water products; of keeping and maintaining a retail and wholesale fish market for the handling of shell and other fish from the waters of the Pacific Ocean, Alaska and the inlets, bays and arms of the Pacific Ocean, and the lakes and rivers of Oregon, Washington, British Columbia and Alaska; and in the handling of fresh, salt, cured and canned fish in and between the city of Seattle and the markets in the state of Washington and other states and foreign countries; and for the manufacture or storage of ice to be used in the packing and handling of fish and other food products of the water, and the furnishing ice to the steamers and other craft touching at said city of Seattle, and to the towns and places upon Puget Sound and tributary country.”

The board of harbor line commissioners rejected the application of plaintiff to lease on two grounds:

“First—That the plaintiff, A. A. Denny, must adjust or acquiesce in the adjustment of tide lands purchased by him as aforesaid to the new plat thereof, before any lease will be granted him for the harbor area aforesaid, or any part thereof. Second—That the use for which the plaintiff, A. A. Denny, desires to lease said harbor area is not a convenience of commerce or navigation, and the structure which, according to said application, he contemplates placing on said harbor area is not a wharf, dock or other structure, within the meaning of the constitution and tide land laws of the state of Washington.”

In the view of this cause taken by the court, it is not

necessary to discuss the first ground of the rejection of the application to lease by the board of harbor line commissioners. Article 15, § 1, of the constitution of the state, relating to tide lands, among other things declares:

“Nor shall any of the area lying between any harbor line and the line of ordinary high tide, and within not less than fifty feet nor more than six hundred feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets and other conveniences of navigation and commerce.”

As asserted by counsel for plaintiff, the word “commerce” is one of wide significance, and in its general sense may mean almost any transaction or intercourse between men. But the word has been restricted by the courts according to the context in which the term has been used. Section 2 of article 15 of the constitution of the state declares:

“The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks and other structures, upon the areas mentioned in section one of this article, but no lease shall be made for any term longer than thirty years, or the legislature may provide by general laws for the building and maintaining upon such area wharves, docks and other structures.”

Counsel for plaintiff contend that the words “navigation and commerce” do not appear in the second section, and that the phrase “and other conveniences of navigation and commerce” appears in the first section; that the second section provides for laws for the leasing of the right to build and maintain wharves, docks and other structures, and that the purpose for which these “other structures” are to be used, or their nature, is not defined; and also argue that navigation and commerce mean one and the same thing, and that commerce includes navigation, and that the word

“commerce” here is used in its broadest import; that the words “navigation and commerce” are words of enumeration, and not those of definition; and that the court is called upon to define their meaning, and such definition should properly be made from a consideration of the people and their wants at the time the constitution was adopted. It is also argued that the reservation of harbor areas is a very broad one, and a comparison is made between the harbor area in front of the city of Seattle and that of other noted emporiums of the world. The contention that “navigation” is included within “commerce,” and means the same thing, cannot be maintained. The word “navigation,” as used in the first section of the article of the constitution quoted, is clearly used as a qualification of the word “commerce,” and the provisions for maintaining upon the harbor area wharves, docks and other structures, by or through the state, refers to structures which are conveniences of navigation and commerce. We think the language as well as the sense of these two sections of the constitution is plain, and the ordinary rules of statutory and constitutional construction fit this sense. It is plainly said in § 2 that the wharves, docks and other structures are those mentioned in § 1. Then the rule of *ejusdem generis* is plainly applicable here, and “other structures” must fall within the genus “conveniences of navigation and commerce.” Our constitution, in its provisions relating to harbor areas in front of cities, is unlike that of any other state constitution that has been submitted to our attention. Therefore it would probably be useless to attempt to find authority to aid in the construction of our constitution. The state of Washington at its formation had before it the experience of the world in the regulation and control of harbor areas. The constitutional convention well knew that private control of these waters had always been inimical to free navi-

gation and to the public interests. The insidious and plausible pretexts for the establishment of private interests in such waters were also well understood, and, however large the harbor areas within the domain of the state, it was well known, from the history of the past and the tendencies of the present, that the organization of private interests in combination would be sufficiently powerful to pervade all these waters. A very fair comment upon the import of these constitutional provisions is found in the Report of the Massachusetts State Board on Docks and Terminal Facilities (1897), p. 37, in which it is said:

“Alive to modern tendencies, the state of Washington, in her constitution, article 15, declares that no water areas beyond high water marks shall be sold or relinquished by the state, ‘but such areas shall be forever reserved for landings, wharves and streets, and other conveniences of navigation and commerce.’ Subsequently a harbor line commission established harbor lines in the navigable tide waters of the state adjacent to the cities, with a view to providing for docks having a length of 600 feet and an avenue fronting thereon of from 100 to 250 feet wide. Thus the water front of all the cities in the state is to be forever preserved in uniform condition, under control of the public, in the interest of economical and convenient commercial uses, secure from the encroachment of individuals or corporations.”

“Curing and canning fish, maintaining a retail and wholesale fish market, and the storage of ice for packing and handling fish,” are not conveniences of “navigation and commerce,” and maintaining establishments of that character and structures erected for such purposes are not the “other structures” mentioned in the constitution relating to this subject. The act of the legislature (Laws 1897, p. 229, § 53, Bal. Code, § 2183), does not contemplate a lease for any other purposes than those specified in the constitution. The act specially reserves to the state of Wash-

Feb. 1898.] Opinion of the Court — REAVIS, J.

ington "the right to regulate, either under rules of the commission or legislative enactment, or by both methods, the rates of wharfage, dockage and other tolls to be imposed by the lessee upon commerce for any of the purposes," etc.

The writ is denied.

DUNBAR, ANDERS and GORDON, JJ., concur.

[No. 2794. Decided February 26, 1898.]

F. J. SELBER, *Respondent*, v. SPRINGBROOK TROUT FARM,
Appellant.

EVIDENCE — ADMISSIONS — SUFFICIENCY OF EVIDENCE.

In an action to recover for the value of labor performed for defendant, it is competent for plaintiff to introduce in evidence a memorandum of time kept under the direction of defendant's foreman, as an admission on the part of the defendant supporting plaintiff's claim.

The appellate court will not disturb the verdict, where the testimony is conflicting, and there is evidence of a substantial character sustaining the verdict, especially after a motion for a new trial has been presented to the lower court and denied.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

W. H. White, for appellant.

W. L. Beddow, and Byers & Byers, for respondent.

The opinion of the court was delivered by

REAVIS, J.—Respondent commenced an action against appellant in the superior court of King county, alleging that he did work and labor at the request of appellant, and alleging the reasonable value thereof; and also that he sold and delivered goods, alleging the reasonable value of

the same; and also that Jane Selber, his wife, performed work and labor for the appellant at its request, of a certain reasonable value, and that such claim was assigned to respondent; and that his son, George Selber, a minor, performed work and labor for the appellant at its request, stating the value of the same, and that it was assigned to respondent. Appellant in its answer denied that the services of respondent were worth the amount alleged in the complaint or any greater sum than had been paid; alleged the payment; denied that Jane Selber or George Selber performed work and labor for it at its request; and alleged that a contract had been entered into between appellant and respondent by which the respondent was to work for appellant for his board, and that Jane Selber should do the cooking for the men employed by appellant in consideration for board and lodging furnished respondent's family by appellant.

There are two assignments of error: First, that the court erred in admitting as evidence against appellant's objection respondent's exhibit A, which was a statement of a portion of time that respondent worked for appellant; and, second, that the verdict of the jury was against the weight of evidence and that the evidence was insufficient to justify the verdict. While respondent was testifying in his own behalf he was handed the paper, exhibit A, and testified that it was a statement of time kept under the direction of the foreman or general manager of appellant and purported to be respondent's time. Respondent stated that this time was kept by authority of the foreman. It is sufficient to dispose of this assignment to say that from the witness's statement this paper was received as an admission of the appellant, *i. e.*, as it was made by one having authority from the appellant to keep such a memorandum, it could be received as a part of the respondent's case. The second

assignment, that the evidence was insufficient to justify the verdict, has been examined in connection with the evidence brought here in the transcript. The respondent and his wife testified that they were engaged by the general manager of appellant to perform work and labor on the Springbrook Trout Farm. The respondent testified relative to wages as follows:

“Q.—What, if anything, was said in regard to what compensation you should receive for your wages?

“A.—No, sir; there was no real wages stated. He said that he was always paying the best going wages, and he never had a man to work for him but what was willing to come back and work for him again.”

Respondent and his wife testified to the reasonable value of the work and labor performed for appellant. Several witnesses, including the manager of appellant, contradicted some of the statements of respondent and his wife, and especially endeavored to show that they were to receive nothing more than their board. But there was a well defined conflict in the evidence submitted to the jury, and we think it falls fairly within the rule that the appellate court will not disturb the verdict where testimony is conflicting and there is evidence of a substantial character sustaining the verdict, especially after a motion for a new trial has been presented to the superior court and denied.

The judgment of the superior court must be affirmed.

SOOTT, C. J., and ANDERS, DUNBAR and GORDON, JJ.,
concur.

[No. 2798. Decided February 26, 1898.]

THE STATE OF WASHINGTON, *Respondent*, v. PAT
BURNS, *Appellant*.

LARCENY—SUFFICIENCY OF INFORMATION—DESCRIPTION OF MONEY—

CONTINUANCE—EVIDENCE—COMMENT BY JUDGES ON TESTIMONY—

INSTRUCTIONS—SEPARATION OF JURY.

In an information charging the larceny of money a description of the property stolen as being two one hundred dollar bills and one fifty dollar bill, lawful money of the United States, is sufficient under Code Proc., § 1253 (Bal. Code, § 6859), which provides that in such cases it is sufficient to allege the larceny to be of money or bank notes, without specifying the coin, number, denomination or kind thereof.

The fact that an information charging the larceny of money, after naming the number and denomination of the bills, alleges further "a more exact description being not now known," while a witness for the state gives an exact description of the bills in his testimony, does not constitute a fatal variance, when there is no showing of want of diligence on the part of the prosecuting attorney to ascertain and charge the exact description.

The refusal of a continuance in a criminal cause does not show an abuse of discretion, when the cause has been finally set for trial more than five weeks after defendant's arrest, one continuance having been granted him in the meantime.

A remark by the court concerning a criminal action, that "it is mostly a case of positive testimony," is not objectionable on the ground of being an expression of the court's opinion on the weight of the testimony.

In a prosecution for the larceny of money, it is competent to put in evidence the money taken from defendant's person when arrested, although not identified as a part of the stolen money, merely as a circumstance showing he had money when arrested, which the jury might properly consider.

Error of the court in stating to the jury that it was not permissible to introduce evidence affecting the character of the defendant, that the court would not permit it, for instance, to be shown that he had committed another offense, is harmless, when the instructions were fair to the defendant otherwise and correctly

Feb. 1898.]

Argument of Counsel.

stated the law, and it does not appear that prejudicial error resulted from the remark.

The fact that, after an order against the separation of jurors, one of them who was taken sick while the jury was out for a meal, was brought separately on a street car to the courthouse in charge of one bailiff, while the remainder of the jury walked there in charge of another bailiff, is not error, when there is no showing that any of the jurors were tampered with in any manner.

Appeal from Superior Court, King County.—Hon. ORANGE JACOBS, Judge. Affirmed.

Tremper & Winstock, for appellant:

An averment in an information that the name of a person or fact necessary to be alleged is unknown is permissible only from necessity, and the information is rendered invalid and the defendant entitled to a discharge therefrom, when it appears at the trial that the name or the fact was either known or could, by the exercise of ordinary diligence, have become known to the prosecuting attorney. *State v. Stowe*, 33 S. W. 799; *Presley v. State*, 24 Tex. App. 494; *Jackson v. State*, 28 N. W. 815; *Merwin v. People*, 26 Mich. 301 (12 Am. Rep. 314); *Commonwealth v. Thornton*, 14 Gray, 41; *Drechsel v. State*, 34 S. W. 934; *Commonwealth v. Blood*, 4 Gray, 33; 1 Bishop, Criminal Procedure (3d ed.), p. 343.

James F. McElroy, Prosecuting Attorney, and *John B. Hart*, for The State:

This court has held under § 1253, 2 Hill's Code, that a description of money stolen is not a necessary allegation in an information. *State v. Hanshaw*, 3 Wash. 12; *State v. Blanchard*, 11 Wash. 116. Under § 1245, subd. 4, 2 Hill's Code, this court has disregarded useless and unnecessary allegations in an information as surplusage. *State v. Ackles*, 8 Wash. 462; *State v. Miller*, 3 Wash. 131.

Where they are contained in an information it is not necessary to prove same. *People v. Nelson*, 56 Cal. 77.

The opinion of the court was delivered by

SCOTT, C. J.—The defendant was convicted of grand larceny and has appealed. The property stolen was described in the information as being two one hundred dollar bills and one fifty dollar bill, lawful money of the United States, etc., “a more exact description being not now known.” The testimony showed that one of the one hundred dollar bills was a United States treasury note, that the other was a national bank note, and that the fifty dollar bill was a silver certificate, and it is alleged that the prosecuting attorney by the exercise of ordinary diligence could have ascertained these facts and given an exact description of the money. It is contended that this constituted a fatal variance. Section 1253, Vol. 2, Hill’s Code (Bal. Code, § 6859), provides:

“In an . . . information for larceny . . . of money, bank notes, etc., . . . it is sufficient to allege the larceny . . . to be of money, bank notes, etc., . . . without specifying the coin, number, denomination, or kind thereof.”

And while it may be conceded that the information should give as correct a description as can be done under the facts known or readily ascertainable, where a description is attempted, we think there is nothing in the case to show want of diligence on the part of the prosecuting attorney, and that the description was sufficient under said statute. Nor do we think any injury resulted to the defendant.

It is next alleged that the court erred in refusing to grant a continuance. The record shows that the defendant was charged with the offense and arrested on the 20th day of May. The cause was once continued and finally called for

Feb. 1898.] Opinion of the Court—Scott, C. J.

trial on the 28th day of June. We think there was no abuse of discretion shown in refusing to grant a further continuance.

It is next alleged that the court erred in commenting on the testimony. The language complained of is that the court said: "It is mostly a case of positive testimony." This was in fact true. The remark was not open to the charge that the court expressed an opinion on the weight of the testimony. There was no error in this respect.

The fourth assignment of error relating to the attempt to prove the bad character of the complaining witness is not supported by the record. Every question asked was answered and there was no offer of further proof ruled out.

As to the next matter, the record does not show a sufficiently definite offer of proof to show that the money might have been lost in some other way, even if such proof would be admissible at all considering the direct testimony against the defendant.

It is contended that there was error in allowing certain money to be put in evidence, alleged to have been taken from the person of the defendant when he was arrested, as there was nothing to identify it as having been any part of the money taken from the defendant. We think, however, it was competent to show that he had money when arrested; its weight as a circumstance tending to show guilt was a matter for the jury to consider.

It is also contended that the court erred in stating to the jury in one of its instructions that it was not permissible to introduce evidence affecting the character of the defendant; that the court would not permit it, for instance, to be shown that he had committed another offense, and it is contended that this suggested in effect that the defendant had been guilty of another offense when there was no proof of the same, and that it tended to his prejudice. We think

the instructions were fair to the defendant and correctly stated the law, and that no prejudicial error resulted from the remark in question, although it properly had no place in the instruction. In this connection, it is alleged that the court was hostile to the defendant or unduly biased against him, although it is not claimed that there was any intentional exhibition of such feeling, but it is based upon the defendant's view of the entire course of the trial, and it is contended that he should have a new trial upon that ground. We find nothing in the record to substantiate this statement, and it should not have been made without more definite grounds. It is also alleged that the verdict was contrary to the evidence. Without going into the evidence in detail we are of the opinion that it was amply sufficient to warrant a conviction.

It is also alleged that the jurors were allowed to separate after the court had ordered them to be kept together. In support of this it appears the jury was conducted to a restaurant in the city by bailiffs for their meals, and that one of the jurors was taken sick and was unable to walk back to the courthouse, but was left in charge of one of the bailiffs and rode to the courthouse in a street car, while the rest of the jurors walked in charge of another bailiff. There is nothing to show that any member of the jury was tampered with in any manner, and there is clearly no error in this particular.

Affirmed.

ANDERS, DUNBAR and REAVIS, JJ., concur.

[No. 2844. Decided February 26, 1898.]

THE STATE OF WASHINGTON, *Respondent*, v. GAIL
LATTIN, *Appellant*.

19	57
28	211

JURORS — QUALIFICATIONS — COMPETENCY — HOMICIDE — RELEVANCY OF
EVIDENCE.

Jurors must be householders, whether summoned on a regular panel or on an open venire to complete the panel, under Laws 1895, p. 139, providing that jurors summoned to serve on grand and petit juries shall be householders, and under Code Proc., § 339 (Bal. Code, § 4978), which requires a juror summoned on an open venire to have the same qualifications as if he had been previously selected on the original list. .

Where a juror discloses on his examination that he has an opinion as to the guilt or innocence of the defendant, which it would take evidence to remove, and it does not clearly appear that he could nevertheless accord the defendant a fair and impartial trial, he is subject to challenge for cause.

In a prosecution for murder to which the defense of justifiable homicide has been interposed on the ground that deceased made an assault with a pistol, which was afterwards found on the ground near where the killing occurred and introduced in evidence, the testimony of persons likely to know whether deceased ever owned the pistol is admissible for the purpose of establishing that deceased had never been seen with the pistol introduced in evidence.

Appeal from Superior Court, Stevens County.—Hon. L. H. PRATHER, Judge. Reversed.

Wirt W. Saunders, E. O. Connor, and Galbraith & Nordyke, for appellant:

It is a well established rule of law that a juror in a criminal case who has acquired and expressed an opinion which would require evidence to remove is disqualified, even though he declares it his belief he could try the case impartially. *State v. Wilcox*, 11 Wash. 215; *State v. Mur-*

phy, 9 Wash. 204; *State v. Coella*, 3 Wash. 99; *Rose v. State*, 2 Wash. 310; *State v. Rutten*, 13 Wash. 203; *Cancemi v. People*, 16 N. Y. 501; *Thurman v. State*, 43 N. W. 404; *Brown v. State*, 70 Ind. 576; *State v. Culler*, 82 Mo. 623.

The court erred in permitting witness Hardison to give negative testimony that he never saw the deceased, Moody, have the pistol about the house, which was introduced in evidence as being the pistol Moody had in his hand at the time of his assault upon Lattin, and which was found where he fell. *Gormley v. Bunyan*, 138 U. S. (34 Law. ed.) 623; *Draper v. State*, 22 Tex. 400; *Jones v. State*, 7 Tex. App. 457; *Myers v. State*, 6 Tex. App. 1; *McReynolds v. State*, 4 Tex. App. 327; *Thompson*, Trials, § 391.

H. G. Kirkpatrick, Prosecuting Attorney, (*Feighan & Ludden*, and *C. A. Mantz*, of counsel), for The State:

It is alleged by counsel for appellant that the court committed error in overruling the challenge to juror Chamberlain. We think the ruling was strictly within the decisions of this court and is in accordance with our statutory provisions upon this subject. The juror, having been fully interrogated, said in answer to the question, "You did not have anything but an impression?" "I guess that is about the right name for it." And, when asked if it would require evidence to remove his opinion, said: "I do not know as it would require very much evidence." And, in answer to the further question, "Your opinion is such at the present time that you are biased a little more on one side than the other?" he answered, "Yes, a very little." And in answer to the question as to whether or not it was such a fixed opinion as to prevent the juror from giving the defendant a fair and impartial trial, he said: "No, sir, I do not think it is."

Feb. 1898.] Opinion of the Court—SCOTT, C. J.

The question of bias is a judicial question to be determined by the *nisi prius* court from the answers of the juror and from his appearance and demeanor. And it seems to us if any effect is to be given to § 346, 2 Hill's Code, the action of the court in this case was proper. We think the ruling of the court is sustained by the ruling of this court in the cases of *State v. Carey*, 15 Wash. 549, and *State v. Coella*, 8 Wash. 512; and is sustained by a majority of the states whose statutes are similar to ours upon the subject. *Smith v. Eames*, 36 Am. Dec. 515; *Monday v. State*, 79 Am. Dec. 314; *Commonwealth v. Brown*, 9 Am. St. Rep. 744 (1 L. R. A. 620); *State v. Medicott*, 9 Kan. 257; *State v. Crawford*, 11 Kan. 32.

Counsel for appellant allege as error that the court overruled the objection to the testimony of the witness Hardison, because said testimony was negative. This would go to the weight and not to the admissibility of the testimony. *State v. Phair*, 48 Vt. 366; Wharton, Criminal Evidence (9th ed.), § 392.

The opinion of the court was delivered by

SCOTT, C. J.—The defendant was convicted of manslaughter and has appealed. The first error alleged is that the court erred in denying the challenge of the defendant to juror Fuller for cause, on the ground that he was not a householder. It is contended by the state that the act, Laws 1895, p. 139 (Bal. Code, §§ 4740-4748), relating to the qualification of jurors, does not affect § 339, 2 Hill's Code (Bal. Code, § 4978). It is conceded that Fuller was not a householder, but he was summoned on an open venire to complete the panel, the number who had appeared on the regular panel being exhausted. In *State v. Cushing*, 17 Wash. 544 (50 Pac. 512), it was held that § 339 and the act aforesaid might both stand, they not being conflicting. The case of *Redford v. Spokane St. Ry. Co.*, 15 Wash. 419

(46 Pac. 650), has been called to our attention as holding that jurors called upon an open venire need not be householders, but the contention there was that the act of 1895 was unconstitutional, on the ground that limiting the persons who could serve as jurors to householders made it class legislation. It was urged by counsel as an additional reason in support of that contention, that there was no such qualification required when jurors were summoned on an open venire, and the court mentioned it as such, but there was no intention to decide that such jurors need not be householders, nor does the opinion so hold. In fact, it was stated that the act was uniform in its operation. Prior to the act of 1895, a juror summoned on an open venire under § 339 had to have the same qualifications as if he had been previously selected on the original list. We are of the opinion that the act of 1895, in prescribing the qualifications of a householder, applies to all jurors, however summoned. Section 339 provides that persons summoned upon an open venire shall be qualified persons, and the law then in force prescribing the qualifications was amended by this act, and § 339 must be read in harmony with it as amended; consequently, it was error to deny the challenge.

It is next contended that the court erred in denying the defendant's challenge to another juror for actual bias, upon the ground that he had formed and expressed an opinion concerning the guilt or innocence of the defendant which would require evidence to remove. This question has been before this court a number of times, and the holding has been uniform that such an opinion is a ground of challenge. The only question to be determined is, whether this falls within it. The witness testified squarely that he had an opinion formed by talking with persons about the alleged crime, and that it would take evidence to remove it. He said he did not know that it would take very much, but it

Feb. 1898.] Opinion of the Court—SCOTT, C. J.

would require some. The only thing to weaken this was the question put by the court, which is as follows:

“Q.—Is that opinion such a fixed opinion in your mind as would prevent you from giving the defendant a fair and impartial trial?

“A.—No, I do not think it is.”

And here the examination ended. The witness did not testify that he could disregard the opinion he had formed, and could enter upon the trial free from its influence, as if he had not formed any, or, in fact, make it appear by his other testimony that he really had no such fixed opinion, but had directly testified that he had one and that it would require evidence to remove it. This apparently was not drawn from him inadvertently, but was an honest and fair expression of the condition of his mind. As to the question put by the court, he may not have understood very clearly what a fair and impartial trial was. It was for the court to find as to that upon the evidence, and there was no evidence to base it on. The challenge should have been sustained.

It is further alleged that the court erred in overruling an objection to certain testimony given by one Hardison, that he had never seen the deceased have the pistol introduced in evidence, and alleged to have been held by him at the time he was killed. This was a disputed fact, and it was competent to prove that the deceased had never been seen to have such, or any pistol, by persons who would be likely to know if he did have one. This witness was an employee of, and had been living with, the deceased. The evidence, although negative, was competent for what it was worth.

It is also alleged that the court erred in sustaining an objection to a question asked a witness as to what the deceased had said to him with reference to his intention of going to the premises in controversy and entering at

all hazard. If we understand the record, this matter had been brought home to the Lattins, and the question was a proper one. It is contended by the prosecution that error, if any, was subsequently cured on further examination of the witness. As the case must be reversed for reasons above stated, it is unnecessary to examine it further. It is further contended that the court erred with reference to some of the instructions given relating to self-defense. It is practically conceded by the prosecution that the particular instructions were faulty, but it is claimed that they were cured by others given. It is unnecessary to set forth the instructions, as the same questions are not likely to arise upon a retrial, and this also is true with reference to a great many other alleged errors, and it is unnecessary to pass upon them for that reason. Some of them have no foundation in the record and some are immaterial.

Reversed and remanded.

ANDERS, DUNBAR and REAVIS, JJ., concur.

[No. 2781. Decided March 2, 1898.]

WASHINGTON DREDGING AND IMPROVEMENT COMPANY,
et al., Respondents, v. WILLIAM PARTRIDGE, Appellant.

APPEAL — WEIGHT OF EVIDENCE.

The findings of the trial court will not be disturbed on appeal, when the evidence is conflicting, unless the weight of evidence is clearly against the findings.

Appeal from Superior Court, King County.—Hon. WILLIAM H. MOORE, Judge. Affirmed.

W. C. Keith, for appellant.

Battle & Shipley, for respondents.

19	62
23	278
23	572
19	63
25	517
25	592
19	62
31	533
19	62
34	146
34	247
35	484

The opinion of the court was delivered by

GORDON, J.—The parties to this record were rival applicants to purchase lot 3, block 221, of the Seattle tide lands. The respondents, Carraher and Polk, are owners of the abutting upland and their application is based upon such ownership. While the appellant Partridge bases his right on the ground that he was the owner of valuable improvements used for residence purposes, and placed thereon by him prior to March 26, 1890. The rights of the other parties to the record are not involved in this controversy. The lower court found that the respondents were, prior to March 26, 1890, and ever since have been the owners of the abutting upland. That their application to purchase the lot in controversy was made within sixty days following the filing of the appraisal of said lot. That within the same time, the appellant Partridge also made his application to purchase as an improver, and further, that the appellant had no improvements whatsoever on said lot in actual use on, or prior to, March 26, 1890, except

“a small shack of the size of about 8x10 feet, which was uncompleted and was not occupied for any purpose whatsoever, and which shack was placed thereon by parties whose name the evidence did not disclose.

“At different times, subsequent to March 26, 1890, but on what particular dates the evidence fails to show, contestant, William Partridge, erected upon a portion of said lot . . . a small building about 18x20 feet in size; also a small kitchen and smokestack, and subsequent to said date also used a portion of the said property as a garden, all of said improvements costing about \$200 or \$250. Said improvements were not of the nature required by law of this state to entitle the improver to the preference right of purchase.”

These findings were duly excepted to, and this appeal is from a decree in respondents' favor. From the brief of appellant's counsel we quote the following:

"There is but one question to be decided in this case, and that is, whether the findings and conclusions excepted to are justified by a fair preponderance of the testimony."

In support of their respective claims each party called and examined four witnesses. The evidence was hopelessly conflicting, and there was a good deal of positive testimony on each side. Under such circumstances our rule has been not to disturb the findings of the trial court unless the weight of evidence is clearly against the findings. In *Hamar v. Peterson*, 9 Wash. 152 (37 Pac. 309), we said:

"In our opinion the finding of the trial court in an equitable action should be adopted by this court in determining the rights of the parties, unless the preponderance of evidence against such finding is so great that we are satisfied it was wrong."

In *Knapp v. Crawford*, 16 Wash. 524 (48 Pac. 261), we said:

"An examination of the record shows that the evidence upon this point was squarely in conflict, and however we might have found from the proofs as an original proposition, we are of the opinion that the case presented by appellants is not strong enough to warrant us in setting aside the findings of the lower court thereon, and the judgment is affirmed."

In the still more recent case of *Skeel v. Christenson*, 17 Wash. 649 (50 Pac. 466), we said:

"If we deemed the testimony upon review as evenly balanced, or even apparently more in favor of appellant than respondent, we should sustain the finding of the court that saw and heard the witnesses."

The decree must be affirmed.

SCOTT, C. J., and DUNBAR, ANDERS and REAVIS, JJ.,
concur.

Mar. 1898.]

Argument of Counsel.

[No. 2784. Decided March 2, 1898.]

W. H. DAVIS, *Respondent*, v. SEATTLE NATIONAL BANK,
Appellant.

19	85
32	362

RES JUDICATA—TO BE DETERMINED BY THE ISSUES—PLEADING—
 INCONSISTENT DEFENSES—ACCOUNT STATED.

Where the issue has been raised and determined in an action by a bank upon a note and over draft that defendant, who had served the bank as attorney, was entitled to nothing on a counterclaim for services rendered, an assignee of the bank who has taken all its assets in consideration of discharging all its liabilities is entitled to plead such judgment as *res judicata* in an action against it on account of such services brought by an assignee of the attorney, who acquired his claim pending the former action.

In determining whether the subject matter of litigation is *res judicata* as to parties and their privies, the court is governed only by the issues and judgment in the prior action, and cannot consider grounds for the judgment which are not contained in the record.

A defendant may deny liability and at the same time plead a counterclaim or offset, without subjecting himself to the charge of pleading inconsistent defenses, if there is no direct contradiction in the special facts pleaded.

The fact that a statement of account had been delivered to defendant and the same retained a long time without objection, would not make it an account stated determining the amount due from defendant, when there was no liability existing on the defendant's part.

Appeal from Superior Court, King County.—Hon.
 ORANGE JACOBS, Judge. Reversed.

Preston, Carr & Gilman, for appellant:

The prior adjudication herein involved was had upon a counterclaim pleaded in defendant's answer. That the rule of *res adjudicata* applies equally to a claim so presented is conclusively shown by the following authorities:

5—19 WASH.

If a cause of action was involved in a former action, either as set off, counterclaim or defense, it is barred by the judgment. *Howe v. Lewis*, 22 N. E. 978; *Wright v. Miller*, 41 N. E. 698; *Green v. Sanbon*, 23 N. E. 224. A party is not bound, when sued, to plead a set off or counterclaim, but, if the issues are so joined that a counterclaim is in fact litigated, the defendant will not be permitted afterwards to sue and recover on the same. *Howe v. Lewis*, *supra*; *Globe v. Dillon*, 86 Ind. 332 (44 Am. Rep. 308); *Thompson v. Schuster*, 28 N. W. 858. A defendant is bound either to withdraw or litigate his demands; and if, after having plead a counterclaim, he fails to support it with evidence, he will be estopped by the verdict from suing on the demand in a subsequent suit. *Eastmure v. Laws*, 5 Bing. N. C. 444; *Gunsaulis v. Cadwallader*, 48 Iowa, 51; Freeman, Judgments, § 279; 2 Black, Judgments, § 763. Where, under a plea of counterclaim, defendant fails to produce evidence in support thereof, a judgment against defendant as to such counterclaim is a final adjudication on the merits, operating as a bar to the prosecution of an action on such claim. *Wright v. Miller*, *supra*; *Green v. Sanbon*, *supra*; *Dougherty v. Cummings*, 9 Ohio Cir. Ct. 718.

In instructing the jury that the plea of set-off is *nolens rolens* an admission of the plaintiff's claim, the learned judge evidently had in mind the English rule, which arose from the fact that the act of parliament only permitted set-off in case of *mutual demands*, and in some cases even required the set-off to contain an affirmative statement of both sides of the mutual account. Jacobs' Fishers' Digest, title "Set-off." But that rule never went so far as stated in the instruction—in a case where the plea was accompanied by a general denial or the general issue. A special plea of set-off, without any traverse of the plaintiff's de-

Mar. 1898.]

Argument of Counsel.

mand, might be considered as admitting it, but where the special plea is accompanied by the general denial, or other defense, no such construction or effect can be given to it. It is only where the plea of set-off is the *only* plea interposed that there can be held to be an implied admission of the justice of the plaintiff's claim. *Morgan v. Boone*, 1 J. J. Marsh. 585; *Waterman*, Set-off, § 617. Although a party pleads a set-off, he is not precluded from relying on any other just defense on the trial of the cause. *Price v. Combs*, 12 N. J. Law, 188. In fact, the right to set-off is regarded as incidental to and dependent upon the plaintiff's having established a right of recovery against the defendant, and if this fails the right of set-off cannot exist. *Brazelton v. Railway Co.*, 40 Tenn. 570. It is proper pleading to add a set-off to a general denial. *Pike v. King*, 16 Iowa, 49; *Freeman v. Fleming*, 5 Iowa, 462; *Bagley v. Carpenter*, 2 Wash. T. 20; 3 Chitty, Pleading, p. 931.

An account stated only determines the amount of a debt where liability in fact exists, and cannot be made the instrument *per se* to create a liability where none before existed. *Austin v. Wilson*, 11 N. Y. Supp. 565; *Bradley Fertilizer Co. v. Publishing Co.*, 17 N. Y. Supp. 587; *Kemp v. Peck*, 13 N. Y. Supp. 112; *Field v. Knapp*, 14 N. E. 830; *Quincey v. White*, 63 N. Y. 379; *Stevens v. Ayers*, 10 N. Y. Supp. 502.

The law requires very explicit evidence to charge one man with another's indebtedness, and a mere retention of account is not sufficient. *Spangler v. Springer*, 22 Pa. St. 458. Failure of one not personally cognizant of the correctness of an account to dispute or object within a reasonable time is not an admission of its correctness. *Schutz v. Morette*, 40 N. E. 780.

Humphries, Humphrey & Edsen, for respondent:

The plea of set-off and counter-claim admits the cause of action. *Bellinger v. Craigie*, 31 Barb. 534; *Davidson v. Remington*, 12 How. Pr. 310; *Kneedler v. Stemberg*, 10 How. Pr. 67; *Steele v. Etheridge*, 15 Minn. 501; *Mason v. Heyward*, 3 Minn. 182; *Dietrich v. Koch*, 35 Wis. 626; *Moore v. Tate*, 87 Tenn. 725 (10 Am. St. Rep. 712); *Holzbauer v. Heine*, 37 Mo. 443. The appellant, by its attempted set-off and counter-claims has admitted respondent's cause of action. *Seattle National Bank v. Carter*, 13 Wash. 281; *Thomas v. Light & Water Co.*, 53 N. W. 710. This court has adopted the rule that inconsistent defenses cannot be pleaded. There cannot be a counter-claim where there is no admission of indebtedness; the same with set-off. *Prouty v. Eaton*, 41 Barb. 409. If there is no admission of indebtedness, there can be no set-off, as it is only when there is a cause of action that there can be a set-off. *Claridge v. Klett*, 15 Pa. St. 255.

The set-off of Wheeler was not allowed [in the former action by the Commercial National Bank]. It could not be allowed in cause No. 21,356, because his claim was against the Seattle National Bank, which was not a party to the suit. In fact, it was determined in that the Seattle National Bank did not own the claims against Wheeler. There is no testimony that any evidence was given by Wheeler upon his set-off in cause 21,536. If no evidence was given there is no adjudication. *Eastmure v. Laws*, 7 Scott, 461; *Reynolds v. Reynolds*, 3 Ohio, 268; *Garrott v. Johnson*, 35 Am. Dec. 272. There could be no adjudication of a stated account against the Seattle National Bank in a suit by the Commercial National Bank against Wheeler. The issues were not the same, the facts are not the same, the parties are not the same, the same testimony would not sustain both actions. *Hoke v. Lowe*, 48 Ill. App. 126; *Atlantic Dock Co. v. Mayor*, 53 N. Y.

Mar. 1898.] Opinion of the Court—SCOTT, C. J.

64. Even a judgment obtained against the wrong party is no bar or estoppel against the right party. *Mathews v. Lawrence*, 1 Denio, 212 (43 Am. Dec. 665); *Bleakley v. White*, 4 Paige, 654; *Fowler v. Bowery Savings Bank*, 47 Hun, 399.

The opinion of the court was delivered by

SCOTT, C. J.—Plaintiff brought this action upon an assigned claim to recover for services performed by one Wheeler as an attorney at law for the Commercial National Bank of Seattle. On November 22, 1894, said bank, desiring to retire from business, entered into an arrangement with the Seattle National Bank, the defendant here, whereby it transferred all its assets to this defendant as security for moneys advanced by it to pay the indebtedness of the Commercial National Bank as shown by its books, amounting to \$68,576.44. It is not claimed that the books of the Commercial National Bank showed it to be indebted to the plaintiff for the services aforesaid. It was further provided in the agreement of transfer that said assets should secure to the Seattle National Bank interest at the rate of eight per cent. per annum on said amount, and should also secure all sums that it might be called upon to pay for the Commercial National Bank; and, in case of an overplus, it was to be paid *pro rata* to the stockholders of the Commercial National Bank. The claim aforesaid was based upon services alleged to have been performed for the Commercial National Bank in a number of different actions, and it was contended by the plaintiff that after the transfer of its assets to the defendant here he continued to perform services in such actions for some months thereafter. The assets so transferred to this defendant included a note for \$1,130, with interest, given by said Wheeler to the Commercial National Bank, and also a claim for an overdraft of \$813.34. Upon Wheeler's being asked to pay

these amounts, he claimed an off-set for the services aforesaid, and it appears that he rendered a statement therefor against both banks jointly. This will be referred to later.

Thereafter the Seattle National Bank re-assigned said claims to the Commercial National Bank for the purpose of bringing suit. The proceeds in case of a recovery, however, were to go to the Seattle National Bank as a part of the assets aforesaid, and for the purposes of the transfer.

In said action Wheeler set up his claim for services as an off-set or counter-claim. The reply contained a denial of the rendition of any such services or of any indebtedness therefor, so that the fact as to whether he had any claim for such services, or had performed the same, was directly in issue in said trial. Thereafter, during the pendency of said action, Wheeler assigned his claim to the plaintiff here, but the same was not withdrawn from the action aforesaid, and in its findings, the cause having been tried without a jury, the court found,

“That the plaintiff was not the first day of November, or at any other time, indebted to the defendant for services as an attorney rendered within three years last past and for money paid to and for the use and benefit of the plaintiff in the sum of \$2,400, or in any other sum or any sum at all, and that the defendant L. H. Wheeler is not entitled to recover anything from the plaintiff upon the cause of action set up in the first cross-complaint contained in his third amended answer herein;”

and rendered judgment thereon as follows:

“That the defendant L. H. Wheeler take nothing by either of the causes of action set up in the cross-complaint in his third amended answer, and that the same and all matters contained in said cross-complaint be and are hereby adjudged and determined, and that the plaintiff recover its costs and disbursements herein and be entitled to execution.”

One of the contentions of the defendant in this case is that this claim was barred by said judgment, and we are of the opinion that it is well taken. No direct contract upon the part of the Seattle National Bank to pay said claim is shown, and its liability, if any, arises by virtue of its having received the assets of the Commercial National Bank. The fact that Wheeler continued to perform services in those actions for some time after said transfer, must be considered as though he were still performing them for the Commercial National Bank or in the prosecution of its business under the assignment, of which he had notice; and the plaintiff in this action, having purchased the claim while it was in litigation, is bound to the same extent that Wheeler would have been bound by the judgment if he had not assigned the claim. This is so well sustained by the authorities that a citation is needless, and in fact we do not understand the general rules aforesaid to be disputed by the plaintiff, except that he contends Wheeler was defeated in the first action on the ground that the Seattle National Bank owed him for the services. If that was the case, he should have had a finding there to that effect, not having withdrawn the claim. We can only be governed by the issues and the judgment. The plaintiff here is the privy of the defendant in that case and the defendant here is the privy of the plaintiff in that case, and the same matter there adjudicated is sought to be retried here, viz.: that the plaintiff performed the services, the value thereof and the balance unpaid. It is argued that unless the plaintiff can maintain this action it will result in the loss of the claim without a trial on the merits. The evidence introduced in the former action is not here, if we could look into it. Wheeler testified in this action that he had been paid various sums from time to time for his services. His claim here is for the balance. We do not know on what ground

the court found against him in the former action, nor is that question before us. As a matter of law the record presents a bar, in the absence of an independent agreement on the part of the defendant here to pay the claim.

In this action the defendant sought to off-set the demands originally held by the Commercial National Bank against Wheeler upon the note and overdraft, and the court charged that by pleading this off-set the defendant admitted its liability to the plaintiff upon the claim for the services performed by Wheeler, and the respondent's counsel maintains that this was correct upon the theory that to dispute the aforesaid claim and at the same time plead an off-set would be setting up inconsistent defenses, and cites the cases of *Seattle National Bank v. Carter*, 13 Wash. 281 (43 Pac. 331) and *Allen v. Olympia Light & Power Co.*, 13 Wash. 307 (43 Pac. 55), but these cases do not sustain his contention. We are of the opinion that a defendant may deny liability, and at the same time set up a counter-claim or off-set, or allege payment, in all cases where there is no direct contradiction in the special facts pleaded, and there is none such here. *Corbitt v. Harrington*, 14 Wash. 197 (44 Pac. 132).

A further question remains to be considered, and that is the contention of the plaintiff that he had a right to recover upon an account stated on the ground that he had delivered a statement of his account to the defendant in this action, and that the same had been retained a long time without objection. The facts as to this are disputed, but, adopting the most favorable construction for the plaintiff, it is well settled that such an account only determines the amount of a debt where a liability exists, and there was no direct obligation here against the defendant. *Bradley Fertilizer Co. v. South Pub. Co.*, 17 N. Y. Supp. 587; *Austin v. Wilson*, 11 N. Y. Supp. 565. A great many questions

Mar. 1898.]

Syllabus.

were submitted to and answered by the jury, but none of them can have a controlling effect on the above questions. As the defense of former adjudication of the plaintiff's claim is sustained, it is unnecessary to consider the defendant's contention as to the right to off-set the note and overdraft or the judgment thereon.

Reversed and remanded accordingly.

ANDERS, DUNBAR, GORDON and REAVIS, JJ., concur.

[No. 2651. Decided March 3, 1898.]

C. E. NYE *et al.*, Respondents, v. MILO KELLY *et al.*,
Appellants.

19	73
25	121

PUBLIC OFFICERS — ACTION ON BOND — LEAVE OF COURT — PARTIES —
INSTRUCTIONS.

In an action upon an official bond by the agents of the state solely for the benefit of the state, leave of court to prosecute the action is not necessary, under Code Proc., § 696, requiring leave of court to be first obtained before the commencement of an action by a plaintiff other than the state, since an action by state agents solely for its benefit is virtually an action by the state.

The objection that plaintiff has commenced his action without leave of court first obtained, in cases where such leave is necessary, is waived, if not raised until after the joinder of issue.

Under Laws 1891, p. 355, § 7, providing that all suits necessary to protect the rights of the state in matters or property connected with the penitentiary and its management shall be prosecuted in the name of the board of state penitentiary directors," such directors, acting in their official capacity, may bring an action in their own names for the benefit of the state upon the official bond of the warden to recover on account of his defalcation of public funds.

Where evidence admitted in the trial of a cause has been subsequently stricken by the court on the ground that its relevancy had not been shown, it is error for the court to subsequently base an instruction upon the evidence as if it were still in the case.

Appeal from Superior Court, Walla Walla County.—
Hon. W. H. UPTON, Judge. Reversed.

Remington & Reynolds, for appellants:

At common law no action could be maintained upon a bond by any party other than the obligee named therein; and the exceptions to this rule must depend upon statutory enactment. Our statutes recognized the fact that official bonds are sometimes given to protect private interests, and have prescribed the conditions upon which parties *not named in the bond* may maintain actions thereon. The state of Washington, in this case, was the proper party plaintiff and the only party interested in the bond, and the complaint states no cause of action in favor of the respondents. *Crook County v. Bushnell*, 15 Ore. 169; *Northampton v. Elwell*, 4 Gray, 81; *Carmichael v. Moore*, 88 N. C. 29; *People v. Stacy*, 74 Cal. 373.

It is reversible error to give instructions liable to mislead the jury that are not based upon legitimate evidence in the case. *Edison, etc., Co. v. Canadian Pacific Nav. Co.*, 8 Wash. 370 (24 L. R. A. 315); *Texas Land & Loan Co. v. Watson*, 22 S. W. 873; *Coughlin v. People*, 18 Ill. 266 (68 Am. Dec. 541); *Andreas v. Ketcham*, 77 Ill. 377; *Goldsmith v. McCafferty*, 15 South. 244; *Caw v. People*, 3 Neb. 357; *Newton Wagon Co. v. Diers*, 10 Neb. 284; *State v. Bailey*, 57 Mo. 131. Where contradictory instructions are given, there is no way of telling which governs the action of the jury, and the erroneous instruction will not be cured by the proper one, even where the proper one is last impressed upon them (which was not the case in this instance). *Parker v. Hull*, 71 Wis. 368 (5 Am. Rep. 224); *Clein v. State*, 31 Ind. 480; *Pittsburg, etc., Ry. Co. v. Krouse*, 30 Ohio St. 222.

Mar. 1898.] Opinion of the Court—GORDON, J.

Patrick Henry Winston, Attorney General, and *T. M. Vance*, Assistant Attorney General, for respondents.

The opinion of the court was delivered by

GORDON, J.—Respondents in their official capacity as directors of the penitentiary brought this action against the appellants as bondsmen of J. H. Coblenz, late warden of that institution, and also against defendant Levi Ankeny, as administrator of the estate of said Coblenz. From a judgment in respondent's favor the bondsmen have appealed. The first contention of the appellants is that the action should have been dismissed because respondents did not obtain leave of court to prosecute the action. Section 695, 2 Hill's Code (Bal. Code, § 5685), provides:

"When a public officer by official misconduct or neglect of duty shall . . . render his sureties therein liable upon such bond, any person injured by such misconduct or neglect, or who is by law entitled to the benefit of the security, may maintain an action at law thereon in his own name against the officer and his sureties," etc.

Section 696 (Bal. Code, § 5686) is as follows:

"Before an action can be commenced by a plaintiff *other than the state*, or the municipal or public corporation named in the bond, leave shall be obtained of the court, or judge thereof, where the action is triable. Such leave shall be granted upon the production of a certified copy of the bond, and an affidavit of the plaintiff, or some person in his behalf, showing the delinquency. But if the matter set forth in his affidavit be such that, if true, the party applying would clearly not be entitled to recover in the action, the leave shall not be granted. If it does not appear from the complaint that the leave herein provided for has been granted, the defendant, on motion, shall be entitled to judgment of non-suit; if it does, the defendant may controvert the allegation, and if the issue be found in his favor, judgment shall be given accordingly."

While this action was brought by the directors, it was in their official capacity and solely for the benefit of the state. Under § 696, *supra*, when the state is plaintiff it is not necessary that leave to sue should be obtained, and there can be no good reason for the adoption of a different rule in a case brought by the agents of the state for its sole benefit. There is another reason why the contention of appellants should not be sustained. Instead of moving against the complaint they demanded a bill of particulars, and, that having been furnished, they saw fit to answer to the merits, and we think the objection was thereby waived. While the question is perhaps not solely a question of pleading, nevertheless the objection, to be available, should be promptly made. Instead of raising the question promptly, as we think appellants were bound to do, they waited until issue was joined and a jury was about to be impaneled, and then moved the trial court for a dismissal. The objection came too late—their motion was overruled, and we think properly so.

It is next urged that the plaintiffs have no interest in the suit and that the action should have been in the name of the state, that the state was the only party interested in the bond and that the complaint states no cause of action in favor of the respondents. We think, however, that by virtue of § 7, Laws 1891, p. 355, the action was properly brought by respondents acting in their official capacity as directors. That section, it is true, relates to the duties of the warden, but it provides that all suits at law or in equity, "necessary to protect the rights of the state in matters or property connected with the penitentiary and its management . . . shall be prosecuted . . . in the name of the board of state penitentiary directors." The suit, while not in the name of the state, is in the name of its statutory agents and for its benefit.

Mar. 1898.]

Opinion of the Court—Gordon, J.

The third assignment presents a more serious question. On the trial evidence was given on behalf of the respondents tending to show that Coblentz, as warden, kept an account in a Walla Walla bank, and that on one occasion he had withdrawn from his account as warden the sum of \$6,000, receiving from the Walla Walla bank a draft upon its correspondent in Portland for that amount, and that thereafter Coblentz deposited the draft to the credit of his personal account with the First National Bank of Seattle. At the close of the respondents' case counsel for the appellants made the following motion:

"There was offered by the plaintiffs, a certain draft for six thousand dollars, which was testified to by witness Turner. The draft was subsequently admitted in evidence by the court, on the promise of counsel that they would connect it and show that the money with which that draft was bought, was state money, and that J. H. Coblentz took state money, bought that draft, deposited it to his credit in the First National Bank of Seattle, and then checked it out, and used the proceeds for his own personal use.

"The defendants move at this time to strike that evidence from the record on the grounds that it is wholly incompetent, immaterial and irrelevant, and on the further ground that the plaintiffs have in no manner whatsoever shown that the money with which that draft was bought was money belonging to the state of Washington, or that J. H. Coblentz converted the proceeds of that draft to his own personal use, it being money of the state of Washington."

After argument the motion to strike was granted, the court remarking:

"When he [Coblentz] placed this money in the bank of Seattle, he had the right to withdraw it under the presumption he would use it honestly as the law required him to, and he could draw one check or one hundred checks for it, and there is no presumption he checked it out for private use. *It seems there is no connection shown between*

the Seattle transaction and anything else in the case, and the motion will be granted to strike."

In charging the jury the court gave the following instruction:

"If you find from the evidence that the J. H. Coblentz named in the complaint was warden of the said state penitentiary and while such warden kept a deposit account with the First National Bank of Walla Walla in the name and style of 'J. H. Coblentz, warden,' and that such account was of and for moneys of the state of Washington deposited by said Coblentz in said bank, and that said Coblentz drew a check signed 'J. H. Coblentz, warden,' of \$6,000 upon said account, and therewith procured a draft of \$6,000, which said Coblentz converted to his own use, you must find the defendants severally liable to the plaintiff in the sum of \$6,000, unless you further find from the evidence that said Coblentz, or his administrator, accounted to the state of Washington for said sum."

To the giving of this instruction the appellants excepted, and have predicated error upon it. Counsel for the respondents very earnestly and ingeniously urge that the motion to strike, and the order of the court granting it, only went to so much of the record as embraced the testimony of the witness Turner (cashier of the Seattle bank in which Coblentz' personal account was kept) as to what was subsequently done with the draft, and that the ruling did not exclude the evidence tending to show that Coblentz drew his check as warden for \$6,000 upon his account with the Walla Walla bank, and procured therefor a draft on Portland in his own favor. After a careful examination of the record we are unable to sustain respondents' position. While the court in ruling upon the motion refers to the subject matter as "the Seattle transaction," the court nevertheless granted the motion, and the motion embraced in its terms all evidence relating to the draft. This view is further

Mar. 1898.] Opinion of the Court—GORDON, J.

strengthened by the language of the court in the instruction, “. . . a draft of \$6,000 which said Coblentz converted to his own use . . .” We think there was absolutely no evidence tending at all to show that the draft was converted to his own use other than that showing that he had deposited it to his credit in the Seattle bank, and it is not to be supposed that the court intended to give an instruction that was not based upon some evidence in the cause. Appellants had a right to rely on the ruling of the court which struck out this evidence, and were not called upon to go into the transaction, and the subsequent action of the court in giving the instruction may not only have misled counsel, but was calculated to mislead the jury, who may well have understood from it that they were to consider and give effect to the testimony of the witness Turner in reference to the disposition made of the draft. In either view, the giving of the instruction constituted reversible error.

Other assignments of error relate to rulings of the trial judge in reference to the admission of evidence. Different books and vouchers of the penitentiary were received in evidence over appellants' objections. We have considered the several rulings complained of, but do not think that any error was committed by the court in regard to them. As a new trial must result, it is not advisable that we should discuss the assignment that the verdict is unsupported by the evidence other than to say that we think there was sufficient evidence to make a case for the jury, and that we would not be authorized to interfere with the verdict upon that ground alone.

But for the error above noticed, the judgment must be reversed and the cause remanded, unless within thirty days the respondents see fit to remit the sum of \$6,000. Upon such remission within that time the judgment will

be affirmed. In either event, the appellants will recover the costs of this appeal.

SCOTT, C. J., and REAVIS and DUNBAR, JJ., concur.

ANDERS, J., concurs in the result.

[No. 2769. Decided March 3, 1898.]

MALCOM McDOUGALL, *Appellant*, v. N. D. WALLING *et al.*, *Respondents*.

19 30
21 479

RIGHT TO OPEN AND CLOSE — AFFIRMATIVE DEFENSE — APPEAL —
WEIGHT OF EVIDENCE.

In an action to recover on a promissory note the amount due with interest and a stated attorney fee fixed by the contract of the parties, which was entered into prior to the act of 1895 authorizing the court to allow such fee as may be reasonable, a defendant who admits the allegations of the complaint and sets up an affirmative defense that he signed as surety and has been released by an extension granted the principal maker, is entitled to the opening and closing of the case, as there is no burden upon plaintiff to prove even a reasonable attorney's fee.

The verdict of the jury will not be disturbed on appeal, where the evidence is substantially conflicting, and the lower court has declined to grant a new trial on the ground that the evidence does not justify the verdict.

Appeal from Superior Court, Snohomish County.—Hon. FRANK T. REID, Judge. Affirmed.

Andrew F. Burleigh, and *Thomas A. Gamble*, for appellant.

F. H. Brownell, and *Coleman & Hart*, for respondents.

The opinion of the court was delivered by

REAVIS, J.—On the 24th of April, 1893, the appellant, at the request of the defendant and respondent, N. D.

Mar. 1898.]

Opinion of the Court — REAVIS, J.

Walling, discounted a note for the sum of \$2,800 signed jointly by N. D. Walling and respondent William G. Swalwell. The note was payable to the order of Walling and indorsed by him. The promise to pay contained in the note was stated severally by using the words, "I promise to pay to the order of N. D. Walling." It also contained a promise to pay, in addition to the costs and disbursements provided by statute, \$50 for attorney's fees in any suit or action instituted thereon. The complaint alleged the execution and delivery of the note by Swalwell to Walling, the transfer of it by Walling to the appellant, the fact that it was not paid, and that defendants promised and agreed to pay \$50 attorney's fees in the action, and the demand for judgment was for the amount due upon the note and for the sum of \$50 attorney's fees. The respondent Walling did not appear and plead. Respondent Swalwell appeared and answered and only denied the contract for attorney's fees, but set up in affirmative defense that the note was made by himself jointly with Walling for Walling's accommodation, and as his surety only, in consideration of a loan made by appellant to Walling alone at the time of the delivery to appellant, which facts were before, and at the time the appellant became the holder of the note, well known to him; and that, except as above stated, there was never any consideration for the making of the note to the respondent Swalwell, and that after the note became due, appellant, while holder thereof, gave further definite time for the payment to the respondent Walling pursuant to a binding agreement made by appellant with Walling without the consent of respondent Swalwell as surety on the note, and that the appellant released respondent Swalwell from payment of the note. Appellant replied, denying the affirmative defense set up by Swalwell and affirmatively averred that long after the time of the extension granted to

Walling by appellant, and after Swalwell had been informed of the extension, respondent Swalwell promised to pay the amount due upon the note. This case was brought here by appellant on appeal from a former judgment, and is found in 15 Wash. 78 (45 Pac. 668, 55 Am. St. Rep. 871). At the former trial in the superior court appellant testified that the extension of payment of the note granted Walling was entered into upon the representation of Walling that he came with instructions from Swalwell to get the time extended, that Walling represented that Swalwell was a banker at Everett, and that it was panicky times and he could not draw the money out of the bank, and pleaded for Swalwell's credit, and that appellant finally consented that he would not start an action for a certain length of time, and that Walling stated most distinctly that he came with Mr. Swalwell's sanction and consent. Counsel for respondent Swalwell at that trial objected to the introduction of any testimony as to what Walling said to appellant because not made in the presence of Swalwell, and the superior court held that the statements were not competent as against Swalwell, adding, "I will allow him to state what was said there, but will cover it with instructions to the jury afterwards;" and thereafter the court charged the jury in respect thereto as follows:

"You are further instructed that when it is sought to bind the defendant by statements made by a third party, not in the presence of the defendant sought to be charged, it must be shown, not only that such statements were so made, but it must be further shown that such third party was authorized to make such statements by the party sought to be charged."

Because of error in the above instruction the case was reversed by this court, and it was held that the testimony was competent and should have been permitted to go to the jury, and that the agreement of extension in order to

Mar. 1898.] Opinion of the Court—REAVIS, J.

release the surety, must be such an agreement as the principal debtor could enforce himself; and the representation by Walling (assuming it was made), that Swalwell requested and consented to the extension which was sought, became material, because, assuming that Swalwell was a surety merely, the representation, if false in fact, was fraudulent, and the agreement to extend, which was secured by means of the false statement, was invalid and ineffectual; and Walling could not have enforced it, because of the fraudulent means employed in obtaining it. It was also suggested by this court that special findings should be required of the jury, and if the jury found that respondent Swalwell was merely surety for Walling, and that appellant knew of that fact at or prior to the time of purported extension, then they should be required to find whether such extension was secured wholly or in part by means of Walling's falsely and fraudulently representing that Swalwell consented thereto. Upon the re-trial of the cause in the superior court the evidence was admitted according to the opinion of this court. Special interrogatories were submitted to the jury, to which the jury answered that Swalwell signed the note only as surety, and that appellant at the time he bought the note knew that Swalwell had signed it as surety only; that Swalwell did not consent that Walling might obtain an extension of time on the note, and that Walling did not obtain the extension on a misrepresentation or false statement that Swalwell knew of the application and consented that the time might be extended; and that Swalwell did not promise to pay the note after it came to his knowledge that an extension of time had been granted. The jury also returned a general verdict in favor of Swalwell. A motion for a new trial was made and denied by the superior court.

Respondent Swalwell obtained leave to amend his answer by striking out his denial of the contract to pay \$50 attor-

ney's fees before trial. Appellant maintains it was error to allow respondent Swalwell the opening and closing of the case over plaintiff's objection, but we think the affirmative was plainly upon the respondent. The attorney's fee was admitted, and the contract was not controlled by Laws of 1895, p. 81 (Bal. Code, § 5166), having been entered into before the enactment of such laws; and under the uniform decisions in this court the attorney's fees, before the enactment of the law of 1895, were fixed by the contract of the parties. We have examined the instructions of the court and do not find error in them. We do not think the rejection of the letter from appellant to Swalwell informing him of the purchase of the note material. Appellant also maintains that the evidence does not justify the verdict, but it is sufficient to say upon this point that the evidence in the record here is substantially conflicting and the jury found for the respondent upon all the issues submitted to it, and the superior court declined to grant a new trial upon this ground. The appellant received a valid consideration for the extension of time.

The judgment of the superior court must be affirmed.

SCOTT, C. J., and ANDERS, DUNBAR and GORDON, JJ.,
concur.

[No. 2797. Decided March 7, 1898.]

19 85
838 551

THE STATE OF WASHINGTON, *on the Relation of P. H. Winston, Attorney General, Appellant, v. THE HUDSON LAND COMPANY et al., Respondents.*

OWNERSHIP OF LANDS BY CORPORATIONS COMPOSED OF ALIENS—CONSTITUTIONAL LAW.

Under the constitutional provision prohibiting alien ownership of lands in this state and declaring that every corporation, a majority of whose stock is owned by aliens, shall be deemed an alien for the purposes of such prohibition, conveyances to a corporation, a majority of whose stockholders are aliens, may be avoided at the suit of the state, although at the time the conveyance was made a majority of the stockholders may have been citizens of the United States.

A lease of lands to an alien for the period of forty-nine years is void under the constitutional prohibition against alien ownership of lands, since such persons cannot be allowed to accomplish indirectly that which they are forbidden to do directly.

Appeal from Superior Court, Spokane County.—Hon. L. H. PRATHER, Judge. Reversed.

P. H. Winston, Attorney General, for The State.

Cyrus Happy, and *Graves, Wolf & Graves*, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—This action was brought by the state on the relation of the attorney general to declare void certain conveyances of realty made by defendants Harriette N. MacDonald and D. W. MacDonald to the Hudson Land Company, a corporation, upon the ground that said corporation is an alien under § 33, art. 2, of the constitution of the state of Washington. It is conceded that at the time the property was conveyed a majority of the stock of the

corporation was owned by citizens of Washington, but that thereafter a majority of the stock was transferred to, and is now held by, aliens. One parcel of the realty was conveyed absolutely to the company, while another was leased for forty-nine years. To the relator's complaint setting up these facts a general demurrer was interposed, which was sustained by the lower court. The relator electing to stand on his pleading, judgment was rendered against him, from which judgment this appeal is prosecuted. We think the court erred in sustaining the demurrer to this complaint. This court in the case of *State ex rel. Attorney General v. Morrison*, 18 Wash. 664 (52 Pac. 228), held that a lease to aliens for ninety-nine years was void for the reason that it was in contravention of the provisions of the article of the constitution above referred to, and because parties would not be allowed indirectly to accomplish a result which they are forbidden to do directly, and we think the same reasoning applies to this case. The language of the constitution is as follows:

“The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void; *provided*, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal or fire-clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition.”

It seems to us that this language is not susceptible of construction. A plain policy was plainly enunciated by

the constitutional convention. That policy was an inhibition of ownership of lands by aliens except as to the character of lands specially mentioned in the proviso, and the constitutional convention, having in mind no doubt the attempt to evade this law which is made in this case, out of an abundance of caution inserted the last provision, viz.: that

“Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition.”

We can not understand what meaning could be attached to this last provision of the act, if a corporation, the majority of the capital stock of which is owned by aliens, is allowed to become the owner of lands. It is contended by the appellant that, because a majority of the stock of this corporation was owned by citizens at the time the land was transferred to the corporation, it would work an injury and a hardship upon the corporation and upon the owners of stock thereof to hold this transfer void, and that, had it been the intention of the constitutional convention to make such an application of the law as this, language more explicit could, and surely would, have been used. We do not think that language more explicit could have been used. Presumably the members of the constitutional convention regarded this question as of great importance, and the article doubtless was passed after careful consideration and revision; and the whole article shows that it was the intention of the law that the ownership of lands by aliens should be prohibited, and that it should be prohibited despite of subterfuges which might be resorted to by aliens for the purpose of becoming such owners; and we have already seen the wisdom of the makers of the constitution in clothing this article in language which is so plain that it is not susceptible of

judicial construction. First, attempts have been made, in the case just above referred to, by aliens to become owners of land through the medium of leases which in effect conferred ownership, and now the constitution is again sought to be avoided and benefits obtained under it by indirection which could not be obtained by direct action. We have no doubt that corporations have it within their power to protect themselves from the dire consequences and hardships which are suggested by appellant in his brief by reason of members of a corporation selling stock to aliens in the corporation; but, if they can not, our laws confer certain benefits on, and exemptions to, corporations which are valuable, and if men see fit to enter into corporations for the purpose of doing business instead of doing it as individuals, and accept the benefits which the law confers upon the corporation, they must also accept the burdens which are incident to a corporate investment. But outside of all this, when it once becomes the established law that deeds of this character are void, members of corporations will not be quick to obtain such deeds, and the hardships dilated on by the appellant will be more in theory than practice. But even if it be conceded that these hardships would have to be endured, the evident spirit of the constitution must be sustained. The broad doctrine is announced that the ownership of lands by aliens is inhibited. The exceptions to that rule are as plainly announced by the constitution. These transfers not falling within the exceptions, the conveyance must be held to be void. The lease for forty-nine years will be held void under the doctrine announced in *State ex rel. Attorney General v. Morrison, supra*.

The case will be reversed with instructions to the lower court to overrule the demurrer to the complaint.

SCOTT, C. J., and REAVIS, J., concur.

ANDERS, J. dissents.

Mar. 1898.] Opinion of the Court—SCOTT, C. J.

[No. 2801. Decided March 7, 1898.]

C. R. WILSON *et al.*, Appellants, v. CITY OF ABERDEEN,
Respondent.

19	89
19	620
19	88
222	108
222	408
19	89
25	210

MUNICIPAL CORPORATIONS—WARRANTS DRAWN ON SPECIAL FUND—
LIABILITY OF CITY FOR PAYMENT.

A city cannot be rendered liable generally upon warrants drawn against a special fund for the payment of a street improvement, even if the remedy of a street assessment proceeding is no longer available. (DUNBAR, J., dissents.)

Appeal from Superior Court, Chehalis County.—Hon. CHARLES W. HODGDON, Judge. Affirmed.

Griffiths & Hutcheson, for appellants:

Upon the point that the city is liable to satisfy special fund warrants out of its general fund when the assessment remedy has been lost, counsel cite *Garden City v. Trigg*, 47 Pac. 524; *Heller v. Garden City*, 48 Pac. 842; *Barber Asphalt Paving Co. v. Harrisburg*, 64 Fed. 283 (29 L. R. A. 401); *Barber Asphalt Paving Co. v. Denver*, 72 Fed. 336; *District of Columbia v. Lyon*, 161 U. S. (40 Law. ed.) 200; *Louisville v. Leatherman*, 35 S. W. 625.

J. C. Cross, for respondent:

In support of the rule of non-liability of the city upon loss of assessment remedy, counsel cites *German-American Savings Bank v. Spokane*, 17 Wash. 315 (38 L. R. A. 259); *Town of Tipton v. Jones*, 77 Ind. 307; *Peake v. New Orleans*, 139 U. S. (35 Law. ed.) 342; *Dillon, Municipal Corporations* (4th ed.), § 482.

The opinion of the court was delivered by

SCOTT, C. J.—The plaintiffs brought this action to recover the amount of certain warrants issued on a contract

for the improvement of a street, and have appealed from a judgment against them. There is some contention by appellants that there was a valid contract entered into upon the part of the defendant to pay such warrants independently of the collection of the special fund, but this position is not sustained by the record. The proceedings of the council in providing for the improvement and letting the contract were not sufficient for anything more than a performance at the expense of the abutting property, and the warrants were issued against that fund only. It is conceded by both sides that the remedy under assessment proceedings is lost, and it is contended by appellants that the city is liable generally, in such case. This cause was tried in the lower court before the case of *German-American Savings Bank v. Spokane*, 17 Wash. 315 (49 Pac. 542), was decided. But appellants contend it is not controlled by that case for the reason that there the remedy under the special proceedings was still available and the question of liability was not ruled upon, where it was lost. It does not appear that these plaintiffs resorted to any proceedings to compel the city to proceed and enforce the assessment proceedings. It is contended by the respondent that such proceedings were diligently pressed and that considerable sums were collected and applied in payment of the warrants issued against the fund, and it is also contended that the city offered to proceed to foreclose against certain other property, if the plaintiffs would become responsible for the costs of the proceedings, it being alleged that the value of the property was not sufficient to meet the costs. It is not clear whether the remedy was lost in consequence of the exhaustion of the property covered by the special liens which was of any value or whether it was barred by lapse of time, but it would not make any difference. We regard all of these latter questions as immaterial, and view the contract

Mar. 1898.] Opinion of the Court—Scott, C. J.

as one binding the city to pay only from the special fund as stated. And whatever the fact may be, for the purposes of this case we adopt the concession that the remedy to prosecute the assessments is no longer available. But, notwithstanding this, we do not think the city should be held liable for the reasons set forth in the case referred to, although the question was not expressly decided in the opinion, it not being necessary. But the reasons for deciding against the plaintiff there apply with equal force against the plaintiffs here, although the special remedy is lost. The obligation rested upon the warrant holders to compel the officers of the city to proceed with the collection of the assessments, and, if they saw fit to allow their remedy to become lost through a failure to compel an enforcement of the assessment proceedings, they, and not the general taxpayers, must bear the consequences. They were bound to take notice of what was being done in the premises, or of any failure to proceed. If the property was exhausted and proved to be inadequate, that loss can not be imposed upon the general taxpayers.

Affirmed.

ANDERS, REAVIS and GORDON, JJ., concur.

DUNBAR, J., dissents.

[No. 2841. Decided March 7, 1898.]

19	92
224	171

R. I. MORSE *et al.*, Appellants, v. A. B. ESTABROOK, as
Sheriff of Whatcom County, Respondent.

HUSBAND AND WIFE—RELATIVE RIGHTS OF COMMUNITY AND INDIVID-
UAL CREDITORS.

Community personalty is subject to execution upon a judgment for the separate debt of one of the spouses, even as against community creditors, when the latter have not obtained a prior specific lien on the property. (GORDON, J., dissents.)

Appeal from Superior Court, Whatcom County.—Hon.
J. P. HOUSER, Judge. Affirmed.

Dorr & Hadley, and *Black & Leaming*, for appellants.
Nicholson & Hurlbut, for respondent.

The opinion of the court was delivered by

SCOTT, C. J.—The plaintiffs brought this action to restrain the sheriff from selling community personal property under an execution issued upon a judgment against the husband for a suretyship debt to which the wife was not a party. The Seattle Hardware Company intervened also to restrain the sale, alleging that they were creditors of the community and that their claims arose upon a sale to the plaintiffs of some of the property levied upon, etc. Judgment was rendered for the defendant, and plaintiffs and intervenor have appealed. In *Powell v. Pugh*, 13 Wash. 577 (43 Pac. 879), it was held that community personal property could be sold on execution to satisfy a judgment against the husband for a separate debt, citing a prior decision of the territorial supreme court. It was urged in that case that the sale ought not to be permitted on the ground that it appeared there was not enough of the community personalty to satisfy the community debts, but it was said that

Mar. 1898.] Opinion of the Court—SCOTT, C. J.

as none of the community creditors were questioning the transaction the court would not express an opinion as to what rights, if any, they could maintain in the premises. That question is now presented by community creditors. The plaintiffs were engaged in the hardware business and had incurred debts to various persons, including intervenors, for the purchase price of merchandise, but in the absence of any specific lien upon such property for such debts they are not entitled to priority over a creditor of the husband who has obtained a prior levy. This has been the settled practice under the territory and state, and, if it is a hardship, it is a matter for legislative remedy. But it may be well to observe that for a long time, during which several sessions of the legislature have been held, this field has been substantially left alone, and as a result the community property law is fairly well settled and understood. It ought not to be disturbed by bringing about such complications as would arise in sustaining the respective claims of the appellants. As it is, business relations are rendered clear and a man's financial responsibility much more easily ascertainable than it would be under the other condition of affairs. Commercial and purely private interests are to that extent simplified and promoted. There are no classes of unsecured debts of the husband, or the husband and wife, with reference to the personal property, and community real estate can only be reached for community debts. The creditors, whatever the character of their claims, are not interested in the community, and as far as the husband and wife are concerned they are protected in the sale of personalty to the extent of the exemptions allowed. There is no ground for disturbing the judgment.

Affirmed.

REAVIS, ANDERS and DUNBAR, JJ., concur.

GORDON, J., dissents.

[No. 2765. Decided March 8, 1898.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN MASON *et al.*, *Appellants*.

CRIMINAL LAW—JOINT DEFENDANTS—RIGHT TO SEPARATE TRIAL—SEPARATION OF JURY.

Under Code Proc., § 1313 (Bal. Code, § 6949), which provides that "when two or more defendants are indicted or informed against jointly, any defendant requiring it shall be tried separately," a defendant is entitled as of right to a severance up to the assignment of the cause for trial, from which time until the jury is sworn to try the cause the matter of granting a severance is within the discretion of the court. (ANDERS, J., dissents.)

It is reversible error for a jury in a criminal case to agree upon and deliver a sealed verdict to their foreman and then separate prior to coming into court to return their verdict, even though such action is pursuant to an agreement between the prosecution and defense and by direction of the court.

Appeal from Superior Court, Spokane County.—Hon. L. H. PRATHER, Judge. Reversed.

Willis H. Merriam, and *John L. Crotty*, for appellants.

John A. Pierce, Prosecuting Attorney, and *Harris Baldwin*, for The State:

Upon the point that the defendant's failure to demand a separate trial before the impaneling of the jury constituted a waiver of his right, counsel cite *People v. Alviso*, 55 Cal. 230; *Willey v. State*, 22 Tex. App. 413.

The opinion of the court was delivered by

REAVIS, J.—The appellants were jointly convicted in the superior court of Spokane county of the crime of burglary, and have appealed from the judgment entered upon the verdict of the jury. After the jury was called and the ju-

Mar. 1898.] Concurring Opinion — ANDERS, J.

rors sworn to answer touching their qualifications to try the case, the defendants demanded that they be given separate trials. The court denied the application for separate trials on the ground that the demand came too late. Section 1313, 2 Hill's Code (Bal. Code, § 6949), provides:

“When two or more defendants are indicted or informed against jointly, any defendant requiring it shall be tried separately.”

The right to a separate trial is a valuable one, and this section of the penal code confers it upon a defendant. It does not specify when the demand shall be deemed waived. We think this right to a separate trial belongs to the defendant, and he may avail himself of the right at the time the cause is assigned for trial. A severance of trial afterwards is in the discretion of the court until the jury is sworn to try the cause, subsequently to which time a several trial can not be granted.

We do not think the objection to the information well taken, and we do not deem it necessary to review here the instructions given by the court. But it appears from the bill of exceptions that, by consent of the defendant and prosecuting attorney and direction of the court, the jury came to a conclusion and gave a sealed verdict to their foreman, and then separated for several hours and came into court to return their sealed verdict. This was reversible error. See *State v. Rogan*, 18 Wash. 43 (50 Pac. 582).

Reversed.

SCOTT, C. J., and GORDON and DUNBAR, JJ., concur.

ANDERS, J.—While I concur in the conclusion that the judgment of the court below must be reversed for the error indicated in the foregoing opinion, it seems to me that, under the statute quoted, the trial court has no discretionary power to deny the request for a separate trial at any time before the jury is impaneled to try the cause. A de-

fendant may not know at the time his case is set for trial that it will be to his interest to have a separate trial, and to require him to make his election at that time might result in depriving him entirely of the benefit of the statute.

[No. 2793. Decided March 11, 1898.]

ANDREW J. KROENERT, *Respondent*, v. B. F. JOHNSTON
et al., *Appellants*.

CORPORATIONS — PAYMENT OF SUBSCRIPTIONS IN PROPERTY — DIFFERENCE BETWEEN VALUE OF PROPERTY AND AMOUNT OF SUBSCRIPTION — STOCKHOLDER'S LIABILITY.

Where, on the organization of a corporation, real estate is turned in by one of the stockholders in payment of his shares at double the value of the real estate, and is so paid by him and accepted by the other stockholders without any intention of thereby defrauding existing or subsequent creditors, such stockholder is not liable for the difference between the face value of his shares and the actual value of the property given by him in payment therefor. (DUNBAR, J., dissents.)

Appeal from Superior Court, Chehalis County.—Hon. CHARLES W. HODGDON, Judge. Reversed.

Austin E. Griffiths, for appellants:

"Stockholders cannot be held liable for the difference between the par value of their stock and the actual value of the property turned in to the corporation in payment of the stock, unless fraud is proved." Cook, Stock and Stockholders, §§ 46, 47; *Fogg v. Blair*, 139 U. S. (35 Law. ed.) 118; *Coit v. Gold Amalgamating Co.*, 119 U. S. (30 Law. ed.) 343; *Coffin v. Ransdell*, 11 N. E. 20; *Bank of Fort Madison v. Alden*, 9 Sup. Ct. 332 (32 Law. ed. 372); *Du Pont v. Tilden*, 42 Fed. 87; *Hospes v. Car Co.*, 50

19	96
19	497
19	510
19	514
19	96
24	624

Mar. 1898.] Opinion of the Court — SCOTT, C. J.

N. W. 1117 (31 Am. St. Rep. 637, 15 L. R. A. 470); *Young v. Iron Co.*, 31 N. W. 814; *Bickley v. Schlag*, 20 Atl. 250; *Medler v. Opera House Co.*, 28 Pac. 555.

J. C. Cross, for respondent.

The opinion of the court was delivered by

SCOTT, C. J.—The defendants were stockholders in the Aberdeen Shingle Company, a corporation organized for manufacturing purposes. The plaintiff is the owner of a judgment against the corporation obtained upon a number of assigned claims. Its property had been exhausted by levies of executions upon prior judgments, and he brought this action seeking to enforce a liability against the stockholders on the ground that the stock held by them had not been paid for, or had not been paid for up to the amount of its par value. The corporation was organized by Johnston, Marc Sherwood, Shoemaker, Hayes and M. R. Sherwood, with a capital stock of \$10,000. The records relating to its organization and business were not kept in a systematic manner nor the proceedings fully shown in its minutes. The record of the trial proceedings is also confused and complicated, whereby we have been put to some difficulty in ascertaining the real contentions of the parties, and if the statement given should not be technically correct it is due to that; but from the briefs and the evidence we think we have presented the substantial matters in controversy.

It seems that the only real parties in interest in the corporation at the time of its organization were Johnston and Marc Sherwood, and that the entire shares of its capital stock were turned over to them in equal amounts and paid for in money and property. A short time after the organization Johnston transferred some of his shares of stock to Hayes, Shoemaker and M. R. Sherwood. We

take this first from respondent's brief, wherein he alludes to Johnston's deposition as showing it without indicating the part of the record where it may be seen. This deposition was not referred to in the index, and we have found it by turning over page by page a large part of the voluminous record. We call attention to this matter in order to prevent similar occurrences as far as possible in the future. We have in some instances imposed a punishment upon appellants for such neglect by striking statements, but as there was an attempt to index the record in this case, which appears to be correct in the main, we have passed it in this instance.

It seems the capital stock was paid for as follows: in money, \$5,500; a boat, of the value of \$500; and real estate of the alleged value of \$4,000. While the cash payment was originally disputed, respondent (plaintiff) seems to have abandoned that contention, and the real controversy is narrowed down to a question of the value of the real estate at the time it was transferred to the corporation, the respondent contending that its real value was less than half the amount for which it was taken, and the court found accordingly. While the evidence was conflicting, we cannot say it preponderates in favor of the defendants, and the finding as to the fact must stand.

No service was had upon Marc Sherwood and Shoemaker, but the cause was prosecuted against the other defendants, and they have appealed from judgments against them severally.

The various decisions regarding corporate liability and the liability of stockholders are so conflicting and so controlled by different statutory regulations as to make an examination of them to determine their weight as authority upon the questions here presented an exceedingly difficult one. Recourse must first be had to our statutes. Section

Mar. 1898.] Opinion of the Court—Scott, C. J.

4262, Bal. Code (Gen. Stat. § 1507), prescribes a liability upon the part of stockholders in a corporation like this for the amounts subscribed by them. This relates to their contractual liability, and if there has been no subscription there is no contract to pay the corporation or its creditors anything in cases where the shares of stock were originally issued as paid up. This action is practically brought as, or has resolved itself into, one to enforce a contractual liability. The fraud claimed bears more especially upon Johnston than upon the other defendants. The basis of it is that by subscribing for \$5,000 of the stock he contracted to pay that amount to the corporation. The alleged fraud consisted in turning in the real estate for a greater sum than its actual value. The only charge of fraud that could obtain against the other defendants was in permitting this real estate to be accepted or in agreeing to accept it for the price stated. As we understand the facts there was no real subscribing by them for any part of the capital stock. In obtaining it from Johnston they assumed no part of his contractual liabilities to the corporation or to the creditors under our statutes. As against them the action can only be maintained on the ground of an actual intentional fraud upon subsequent creditors of the corporation, and there was no proof of any such; and we think the same result follows as to Johnston, under the proofs. There was no showing that the corporation was formed with the design to issue any paper or obligations to third parties or put any such afloat upon the market, or to incur any indebtedness at all. This was found necessary in the later prosecution of its business. We will first consider the case as to Johnston, for if there was no fraud, actual or in law on his part, there was clearly none as to the other appellants. We start with the proposition that in all private corporations formed for pecuniary profit, with the excep-

tion of corporations formed for mining purposes, an original subscription for the capital stock is required under the law, and that the parties subscribing become thereby obligated to pay the amounts subscribed, but in the absence of fraud the manner and kind of payment may be agreed upon among the incorporators, although there is no statute expressly providing, as does § 4280, Bal. Code (Gen. Stat., § 1588), that in the case of corporations formed for the working and developing of mining claims, etc., the capital stock may be represented entirely by the mining claims conveyed to the corporation, and that there need be no subscribing, nor any statute expressly authorizing a payment in property, it is yet conceded, and is undoubtedly the settled law here as to corporations like the one here in question, that property may nevertheless be turned in as a payment of the amount subscribed, but it is contended that the rule is different as to such corporations in that the property must then have a present actual value equal to the sum for which it is turned over in payment, and not a prospective or agreed one merely. There was no actual intended fraud here proved against any one of the incorporators or stockholders. If the judgment of the lower court can be sustained, it can only be upon the ground of a mere overvaluation of this real estate when it was turned in. As to Johnston it presents a double aspect, viz., that he contracted to pay a certain amount by his subscription and that he actually paid less than that amount in consequence of the real estate's being worth less than the sum for which it was accepted. As against the other appellants, they not having subscribed for any shares of stock, there was no contractual liability whatever (2 Thompson, Commentaries on Law of Corporations, § 1577), and it not being shown that any actual fraud was intended there was no foundation for any judgment against them

Mar. 1898.] Opinion of the Court—SCOTT, C. J.

at all. There was some testimony by the plaintiff that before he commenced buying the company's paper he had a talk with one of the Sherwoods, who told him the stock was fully paid up, and that the real estate had been donated to the corporation, etc. But the corporation was not liable for any such representations, even if intentionally false, conceding there might be a liability as against the corporation for misrepresentations of its officers and agents in dealing with a third party whereby the corporation should fraudulently obtain his property, for which the corporate property might be seized and its unpaid stock subscriptions collected. No such case is presented here. There might also be an individual liability established against the stockholder for a fraudulent misrepresentation respecting the corporation in some instances, but his liability there would not be controlled nor affected by his stock subscription. It would be entirely independent of it. But that is not this case. Without setting forth the testimony, the most favorable view proved for the plaintiff is that there was an overvaluation of the real estate turned in as a partial payment, but that this was offered, agreed upon and accepted without any intention to defraud any one, the corporation being formed for a legitimate and useful purpose. While the records of its proceedings were not fully kept, and no formal resolution accepting the real estate was shown as of record, it was amply proven that such was the agreement, and the proof was admissible, although the records were deficient. The mere fact of overvaluation does not establish a fraud in law as against Johnston, or, in other words, render him liable to a subsequent creditor for the difference between the actual value and the agreed value upon his subscribed liability. This could only affect Johnston as stated, and not the other appellants, for he could dispose of his stock as he pleased, and the parties obtaining it would

not assume any liability to the corporation or to its creditors, in the absence of any actual or intended fraud upon their part. *Christensen v. Eno*, 106 N. Y. 97 (12 N. E. 648, 60 Am. Rep. 429); *Christensen v. Quintard*, 8 N. Y. Supp. 400. There could be no constructive fraud as to them under our statutes, much less a contractual liability.

In § 1616, 2 Thompson's Commentaries on Corp. Law, it is stated that a strict rule is recognized by some courts, to the effect that a payment of corporate stock in anything except money will not be regarded as payment except to the extent of the true value of the property received and regardless of the question of fraud, that in such cases the true inquiry is, what was the reasonable market value of the property conveyed or services rendered, and this doctrine meets with the author's approval. But in § 1618 a more generally accepted rule is given, to the effect that overvaluation must be fraudulent, and that in such cases actual fraud is meant in the sense of a dishonest purpose and not constructive or theoretical fraud, and in the absence of such the courts, even where the rights of creditors are involved, will treat that as a payment which the parties have agreed should be a payment. This seems to us to be the more reasonable and equitable rule, and sustained by the greater weight of authority. There is no hardship in requiring a party ordinarily who contemplates having dealings with a corporation or of purchasing its outstanding obligations to acquaint himself with the actual property it has. The fact that it was incorporated with a certain amount of capital stock, large or small, should make no difference in the absence of a fraudulent, dishonest purpose, as if organized for the object of issuing and floating its obligations with an apparently real but actually only a fictitious value. A knowledge of the amount of its designated capital stock would afford little or no criterion to de-

Mar. 1898.] Opinion of the Court—SCOTT, C. J.

termine the amount of its assets, if it had been fully paid in money. Its capital might be lost or impaired through legitimate business transactions, and it would be just as reasonable to hold that it would be a fraud on the creditors, if it was not kept good and up to the stated amount. If it were an open question here, we should incline to the latter rule as expressed in § 1618, and so well sustained by eminent authority. In fact our statutes, in prescribing no liability except the contractual one, would seem to require it (§ 1577, *supra*). But it is not an open question. In *Turner v. Bailey*, 12 Wash. 634 (42 Pac. 115), this court approved the latter rule, and held that, where fully paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account, citing a number of cases, and there are many more, to sustain it, and citing also with approval § 134 of Thompson on the Liability of Stockholders, stating that even where the rights of creditors are involved the courts will treat that as payment which the parties have agreed should be payment, in the absence of actual fraud. Attention has been called to the case of the *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 16 Wash. 499 (48 Pac. 333, 737), but the facts proved in that case were understood as bringing it within the rule applied to actual intended fraud in the prosecution of its business, whatever the intention may have been when the corporation was formed, and presented essentially different questions from the ones here considered. Also in the case of *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614 (48 Pac. 415), while there was perhaps something said which, considered alone, might seem in conflict with *Turner v. Bailey*, *supra*, this discussion must be limited by what was decided in the case, and there was no intention to overturn the rule indorsed in *Turner v. Bailey*, *supra*, in either of

these later cases. The case of *Adamant Mfg. Co. v. Wallace* was disposed of on the ground that the creditors there knew that the stock subscriptions had been paid for in property of less value than the face value of the shares, and that consequently there was no fraud practiced upon them. If the strict rule mentioned in § 1616, *supra*, were followed, it would make no difference whether they knew it or not. Such knowledge would not be in the nature of an estoppel, for the creditors had nothing to do with the fixing of the price. In fact, it could better be said that in trusting the corporation they relied upon a right to enforce payment against the stock subscriber of the difference between the actual and the agreed value of the property transferred in payment. The decision sustains *Turner v. Bailey*. See, also, *Roy & Co. v. Scott, Hartley & Co.*, 11 Wash. 399 (39 Pac. 679).

It is of course a salutary, well established rule that a party is bound by what he knows, and it is just as well settled that he is charged with a knowledge of facts with which he may easily acquaint himself, and on these grounds this plaintiff would be defeated for the means of information were easily accessible. It does not appear that there was any misrepresentation to him of the amount of property that the corporation actually had at the time he commenced purchasing its obligations. In fact, it appears that he knew what property it did have. He testifies that he examined its records and that he had been told that the stock was fully paid. We think he would have been charged with that knowledge here, even though he had not investigated it. The law exacts reasonable caution on the part of the citizen in the conduct of business affairs, and is not overly zealous in protecting or enforcing the claims of those who are negligently careless or show a willingness to be misled.

The doctrine followed in this case, under the rule previously recognized, is only extending to a corporation the same protection that is extended to individuals, and is a just, equitable and necessary rule, especially in a state like this where we have witnessed a rapid and steady growth of private corporations, until a large part of its citizens have become directly interested therein. It has become the favorite, prevailing method for men of moderate means to engage in business enterprises, and the great bulk of business in all its ramifications in manufacturing enterprises, commerce, fisheries, irrigation of arid lands, mining and trading, even to small local concerns, is carried on through corporate agencies. The development of the state practically depends upon the success of such undertakings. All of its citizens are thereby greatly interested therein, and they are certainly entitled to reasonable protection. It is enough to hold them liable for actual fraudulent intent in their formation. This rule is sufficient to reach all those formed for dishonest purposes, and all can be held liable for dishonest, fraudulent practices, regardless of the original scheme of formation. But aside from this, it leaves men free to make their own contracts and place their own valuations upon their property. If a man desires to turn in property as a payment of shares of stock, and his associates are willing to take it at an agreed price, no one else being then interested, that agreed valuation should stand without danger of his being called upon to account years afterwards by some one who has dealt with the corporation, who might easily have ascertained its actual condition, in case he should think that such property was worth less than its value, as accepted by the corporation. A fraudulent representation of the amount of property it actually has is one thing, and a mere excessive estimation of its value is another and entirely different one. To sustain an agreed

valuation of property made in organizing a corporation does not contravene the trust fund theory. That relates more particularly to the disposition of its property after its organization and commencement of business, such as a distribution of it among the shareholders by dividends to the prejudice of its creditors. 2 Thompson, Commentaries on Corp. Law, § 1576.

The judgments rendered in this action must be reversed, and the cause remanded with instructions to dismiss it.

ANDERS and GORDON, JJ., concur.

REAVIS, J., concurs in the result.

DUNBAR, J. (*dissenting*).—I dissent, for the reason in the first place that the decision in this case is directly opposed to the decision rendered by this court in the case of *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614 (48 Pac. 415). It is stated in the opinion in this case that there was perhaps something said which, considered alone, might seem in conflict with the opinion expressed by the majority, but that the case was disposed of on the ground that the creditors there knew that the stock subscriptions had been paid for in property of less value than the face value of the shares. There was not only something said in that case which was opposed to the rule laid down in this case, but it was specially decided, and the rule was announced clearly and emphatically, that the stock subscribed must be paid for in money or money's worth, and the opinion stated, after reviewing the facts and the law:

"This case, then, falls squarely within the rule which we have announced above, and, if there were no estoppels, the creditor would undoubtedly have the right to pursue this trust fund into the hands of the stockholders."

It is true that the creditors were held estopped from asserting that they had been misled by the action of the cor-

Mar. 1898.]

Dissenting Opinion — DUNBAR, J.

poration, but there would have been no necessity for the court to have invoked the doctrine of estoppel, if in any event the stockholders were not responsible to them for turning in their property at an overvaluation. If the majority of the court desires to recede from the law expressed in that case, it should be done by squarely overruling that decision so that the lower courts and the attorneys of the state will have some way of ascertaining what the law is on this question. As it is, a reading of the opinion referred to and of the majority opinion in this case will serve to confuse instead of to enlighten.

But, on principle, I am opposed to the doctrine announced in this case, regardless of any former decisions. There is no reason in law or morals why a corporation should not be compelled to act squarely and fairly with the world. Practically, it is impossible for the ordinary person dealing with a corporation to make such an examination as is referred to by the majority in this case, and he is helpless if he cannot rely upon the announcement of the corporation that its capital stock is of a certain actual value. The idea that he can protect himself by an examination of the books and property of the corporation is beautiful in theory, but desperate in practice. The doctrine that the liability of the shareholders to contribute the amount of their shares as capital is treated in equity as assets, is so well established that it would be almost revolutionary at this time to overturn it. Indeed, the majority opinion acknowledges the trust fund theory, but the great difficulty under this decision will be to *find* the fund that is acknowledged.

Assuming that the findings of the court are correct, the judgment should be affirmed.

[2814 Decided March 14, 1898.]

JOHN CREAGH, *Appellant*, v. THE EQUITABLE LIFE
ASSURANCE SOCIETY OF THE UNITED STATES, *Re-*
spondent.

TRIAL—DIRECTING VERDICT.

Where plaintiff's action is founded upon a written contract, whose construction is a matter of law for the court, the withdrawal of the case from the jury at the close of plaintiff's case and directing a verdict for defendant, there being no conflict in the testimony at that time, is in no sense a deprivation of the constitutional right of trial by jury.

Appeal from Superior Court, King County.—Hon.
E. D. BENSON, Judge. Affirmed.

Arthur & Wheeler, for appellant.

Burke, Shepard & McGilvra, for respondent:

The challenge to the legal sufficiency of plaintiff's evidence, permitted by the act of March 8, 1895, is not an invasion of the right of trial by jury. The constitutionality of this practice is sustained by the great weight of authority. *Naugatuck R. R. Co. v. Waterbury Button Co.*, 24 Conn. 468; *Carver v. Plankroad Co.*, 61 Mich. 592 (28 N. W. 721); *Munn v. Mayor*, 40 Pa. St. 364; *Cooper v. Waldron*, 50 Me. 80; *Hopkins v. Nashville, C. & St. L. Ry. Co.*, 34 S. W. 1029 (32 L. R. A. 354).

Per Curiam.—This action was brought by the appellant against the respondent, The Equitable Life Assurance Society, upon a written contract of employment by the respondent as its general agent for the Province of British Columbia. At the close of the appellant's testimony, the respondent interposed a challenge to the legal sufficiency

Mar. 1898.]

Opinion Per Curiam.

of plaintiff's evidence, and moved the court to decide as a matter of law that a verdict should be found for the defendant, and to direct judgment to be entered in accordance with such decision. This motion was sustained by the court, and judgment was entered for the defendant, and from such judgment plaintiff prosecutes this appeal. The written contract upon which this controversy depends is somewhat intricate and involved, but without particularly analyzing it in this opinion, from the best light which we have been able to bring to bear upon its examination, we are of the opinion that the proper construction was placed upon it by the lower court. This being true, and the written contract being the basis of the action, the errors assigned by the appellant are immaterial.

Under the uniform decisions of this court there has been no deprivation of a constitutional right of trial by jury in this case. There is no conflict in the testimony, for the testimony is that offered by the appellant only. The construction of a written contract is a question of law for the court, and not a question of fact to be decided by a jury, because there are no questions of fact controverted; and we have always decided that if as a matter of law the undisputed testimony of the plaintiff does not establish a legal claim the court is warranted in taking the case from the jury, or of directing a verdict for the defendant. This being true, as we construe the contract, the plaintiff could not under any circumstances have obtained a judgment. It follows that the court committed no error in the judgment rendered.

Affirmed.

[No. 2684. Decided March 16, 1898.]

THE STATE OF WASHINGTON, *Appellant*, v. FRED W.
BUTLER, *Respondent*.

APPEAL—TIME OF FILING NOTICE.

Jurisdiction to hear an appeal is not conferred upon the supreme court where the appellant does not file his notice of appeal in the clerk's office until seven days after its service on respondent, when the statute requires that such filing should be made within five days after service.

Appeal from Superior Court, Snohomish County.—Hon. FRANK T. REID, Judge. Appeal dismissed.

P. H. Winston, Attorney General, and *Thomas M. Vance*, for The State.

Per Curiam.—This action was brought by the state to eject the defendant from certain lands alleged to have been granted to the state for the support of its common schools. The land had been patented to the defendant, but it was contended that he had settled thereon after title had vested in the state, and while the same was unsurveyed. Judgment having been rendered for the defendant, the state has appealed. There has been no appearance in this court by the defendant. The record discloses that the notice of appeal was served on the 10th day of June, 1897, but that it was not filed until the 17th day of said month. This was insufficient to confer jurisdiction upon this court. *Watson v. Pugh*, 9 Wash. 665 (38 Pac. 163); *Howard v. Shaw*, 10 Wash. 151 (38 Pac. 746); *Fairfield v. Binnian*, 18 Wash. 1 (42 Pac. 632); *Puckett v. Moody*, 17 Wash. 609 (50 Pac. 494).

It follows that the appeal must be dismissed.

[No. 2723. Decided March 17, 1898.]

THE FIRST NATIONAL BANK OF OLYMPIA, *Respondent*, v.
MILO A. ROOT *et al.*, *Defendants*, CHARLES T. LANS-
DALE, *Administrator*, *Appellant*.

DECEDENT'S ESTATE—CLAIMS—ACTION ON REJECTED CLAIM—EVIDENCE.

In presenting to the administrator of an estate a claim based upon a promissory note, a copy of the note verified by affidavit is sufficient under Code Proc., § 980 (Bal. Code, § 6229), without producing the original, unless the production of the latter for examination may have been demanded by the administrator.

In an action against an administrator upon a claim founded upon a promissory note, which had been rejected by him, both the original note and the rejected statement of claim containing a copy of the original note, are admissible in evidence.

Appeal from Superior Court, Thurston County.—Hon. ORANGE JACOBS, Judge. *Affirmed*.

John R. Mitchell, for appellant.

T. N. Allen, for respondent.

The opinion of the court was delivered by

REAVIS, J.—Action brought to recover judgment on a promissory note executed by defendants Root and wife and R. H. Lansdale and M. P. Lansdale on the 4th of October, 1895, payable six months after date, to the order of respondent. On November 21 following M. P. Lansdale died intestate. On March 23, 1896, appellant Charles T. Lansdale received letters of administration on the estate of M. P. Lansdale, so deceased, and has since been such administrator. On April 26, 1896, respondent presented to the administrator Charles T. Lansdale a verified statement of the claim evidenced by the note, which statement contained a copy of the note. This statement of claim was on July

13, 1896, indorsed "rejected," and returned by appellant administrator to respondent. On July 15, 1896, respondent again presented to appellant a verified statement of the claim which contained a copy of the note, which claim was, on July 27th following, rejected by appellant, which rejection was indorsed on the statement of the claim. On the trial of the cause the two statements of claims, as mentioned before, were offered in evidence by respondent and received by the court over the objection of appellant, and the promissory note itself was also offered in evidence by respondent and received over appellant's objection. The cause was tried before a jury and appellant offered no testimony. The superior court, on motion of respondent's counsel and over the objection of appellant, instructed the jury to return a verdict according to the prayer of the complaint, and judgment was entered upon such verdict. The only error assigned by appellant is the admission of the rejected statements of claims and the promissory note in evidence. The appellant maintains that the promissory note itself is the claim meant by our probate laws, and not a copy verified by affidavit which was offered to the administrator in this case. But § 980, 2 Hill's Code (Bal. Code, § 6229). contains this clause:

"The executor or administrator may also require satisfactory vouchers to be produced in support of the claim."

It will thus be seen that the administrator could have demanded the production for his examination of the promissory note in question, but he did not do so. Every claim which has been allowed must be filed in the court, and it is then ranked among the acknowledged debts of the estate, to be paid in the course of the administration. We see no particular reason for filing the promissory note with the clerk of the superior court until it is paid. It may be noted here, too, that although the promissory note in contro-

Mar. 1898.]

Opinion Per Curiam.

versy is negotiable, yet its negotiability had terminated at the time of the presentation to the administrator, it then being overdue. So the suggestion that negotiable paper might pass from the administrator to an innocent purchaser is not in point here.

We perceive no error in the record before us, and the judgment of the superior court is affirmed.

DUNBAR, GORDON and ANDERS, JJ., concur.

[No. 2766. Decided March 17, 1898.]

JOHN JENKINS, *Respondent*, v. WILLIAM B. POWE, *Appellant*.

APPEAL — COSTS IN LOWER COURT — QUESTION NOT RAISED BELOW.

The supreme court will not consider and determine the right of a party to an allowance for costs incurred in the lower court, when the lower court has never been called upon to pass upon the question.

Appeal from Superior Court, Thurston County.—Hon. CHARLES H. AYER, Judge.

Motion of respondent to amend judgment dismissing the appeal, so as to include costs in lower court. Denied.

A. L. Campbell, and G. C. Israel, for appellant.

Charles M. Dial, and Phil. Skillman, for respondent.

Per Curiam.—Upon respondent's motion based upon a short record the appeal in this cause was dismissed on October 19, 1897. Thereafter respondent filed a motion to amend the judgment of this court and include therein certain costs claimed by respondent to have accrued during the pendency of the action in the superior court, and which

—through inadvertency, it is claimed—were omitted from the judgment of that court. This motion was denied on January 28, 1898, for the reason that it did not appear to us that the lower court had ever passed upon the question of respondent's right to the allowance. But in denying the motion we filed no opinion and we are now requested to indicate our reasons for denying the same in order that the decision of the motion may not prejudice any right of respondent to apply to the superior court for such remedy as he may be entitled to. Without attempting to determine whether or not respondent is entitled to such costs, we conclude that the parties are entitled to be informed of our reasons for denying the motion to amend the judgment, and as already stated, the sole reason for our decision was that it did not appear to us that the matter had ever been passed upon by the superior court, and that in the exercise of our appellate jurisdiction we could not properly consider it.

[No. 2892. Decided March 17, 1898.]

THE STATE OF WASHINGTON, *on the Relation of Henry Holgate*, v. SUPERIOR COURT OF STATE OF WASHINGTON FOR PIERCE COUNTY *et al.*

NEW TRIAL—PARTIES AFFECTED BY GRANT OF—APPEAL—MANDAMUS
—ESTOPPEL AGAINST CHANGING THEORY OF CASE.

The action of the court in granting a new trial must be held for the benefit of all the defendants, although applied for by but one of them, when it appears that the new trial was granted on the ground that the court had received the verdict in the absence of the parties, thereby constituting an irregularity in the proceedings of the court prejudicial to all the defendants.

Where an appeal has been taken from the order of the court granting defendants a new trial upon the application of one of

the defendants, if the appellant does not on appeal raise the question that the grant of new trial applies only to the defendant moving therefor, but litigates the case in the supreme court on the theory that the order applied to all the defendants and the defendants all appear and resist his appeal, he is estopped from afterwards raising the question in mandamus proceedings that only the party moving for the new trial is entitled to the benefit of the order granting one.

Original Application for Mandamus.

Claypool, Cushman & Cushman, for relator.

The opinion of the court was delivered by

DUNBAR, J.—This is an application for a writ of mandamus to compel the superior court of Pierce county to direct and cause to be entered in the journal of said court a personal judgment in favor of relator against the defendant Parker in the case of Holgate v. Parker, et al., upon a verdict heretofore rendered in that case. The application and the record show that the relator was plaintiff in an action against defendants Parker and Kirby, in which action a judgment was obtained in favor of the plaintiff for \$500. Subsequently a motion was made for the vacation of the verdict and the granting of a new trial, which motion was sustained by the court, and a new trial ordered. The burden of the relator's complaint is that the notice that the motion for a new trial would be made was given by defendant Kirby alone, and that inasmuch as defendant Parker did not join in said motion the setting aside of the verdict and the granting of the motion for a new trial did not affect him, and that he is now entitled to have judgment on the verdict entered against him. The complete record in this case was before this court on appeal taken by the relator from the action of the court in sustaining the motion to set aside the verdict and grant a new trial in this case. And from the whole record we are inclined to

the opinion that the motion for vacation and for a new trial was treated by all the parties and by the court as a motion by the defendants and not by one defendant alone. And we have uniformly held that we would determine a case here on the theory on which it was tried below. These defendants were represented by the same counsel, and while the notice of intention to make a motion for a new trial relates that the motion will be made by defendant Kirby, it does not indicate that the motion will be made in his interest alone, but that the motion will be made to vacate and set aside the verdict rendered in the cause, and the motion itself does not indicate by which defendant it was made, either in the motion or by the signing of the same, for it is simply signed "Murry & Carroll, Attorneys for Defendant," and it was the evident intention of the court to vacate this verdict and grant the motion for a new trial in favor of both of the defendants, for after reciting the incidents of the case, viz., that the verdict had been received in open court without notifying the counsel for either party, the court concludes

"that it was error prejudicial to the defendants to receive in the absence of defendants' counsel such verdict at said time, . . . for the reason that it deprived said counsel for defendants of the opportunity to poll said jury, and that defendants and their counsel did not waive their right to poll said jury by being absent at the time said verdict was received, and said jury discharged. That the reception without agreement and without notice of said verdict subsequent to the adjournment and prior to the re-convening of said court for regular business constituted an irregularity in the proceedings of the court and entitled the defendants to a new trial."

And it was urged by the relator in his brief on appeal, that the court acted on the theory that it did not have the power to receive the verdict under the circumstances under which it was received; if this were true, the court could

set aside the verdict on its own motion. But even if technically the vacation of this verdict and the granting of a new trial was not asked for by, or in the interest of, defendant Parker, we think the relator is estopped from raising that question now. As we have before stated, an appeal was taken by the relator to this court from the judgment of the superior court in granting this motion for a new trial, and the trial court was sustained by this court in that case, and the question which is now urged by the relator should have been urged in that case. Both Parker and Kirby were made respondents in that case, the notice of appeal was given to them, and the bond was executed in their favor. They both appeared here by attorneys and resisted the appeal, and if the order of the court did not apply to Parker that matter should have been presented to this court on the appeal, and if the law is as claimed by the relator, the judgment would have been modified to that extent. The notice of appeal was given to both Kirby and Parker, and the substantial part of it is as follows:

“You and each of you are hereby notified that the plaintiff in the above entitled action hereby appeals to the supreme court of the state of Washington from the order and decision of the said superior court in the said action made and entered of record on or about the 18th day of May, 1897, wherein and whereby it was considered, ordered and adjudged by the court that the motion of defendants for a new trial should be and was allowed.”

It was evidently the understanding then of the appellant, who is now the relator, that the judgment applied to both of the defendants. The whole record and all the orders and notices given by and to the appellant show this conclusively. It has often been held by this court that an appeal cannot be taken piecemeal. It would amount to this and something more to allow a question which had been or could have been adjudicated upon an appeal which has

already been submitted to this court to be raised now by an application for mandamus. The writ will be denied.

SCOTT, C. J., and ANDERS, GORDON and REAVIS, JJ., concur.

[No. 2874. Decided March 18, 1898.]

THE STATE OF WASHINGTON, *on the Relation of J. E. Sligh*, v. SUPERIOR COURT OF MASON COUNTY, HON. CHARLES W. HODGDON, *Judge*.

WRIT OF PROHIBITION — TO SUPERIOR COURT — WHEN LIES.

A writ of prohibition will not lie to restrain the superior court from canceling and vacating a notice of *lis pendens*, which had been filed by an appellant after taking an appeal from the judgment of said court, since the action of the court in such matter is reviewable upon appeal.

Original Application for Prohibition.

J. E. Sligh, for relator.

Bates & Murray, and *John A. Parker*, for respondent.

Per Curiam.—This is an application for a writ to prohibit the lower court from setting aside a *lis pendens* based upon the following facts: The appellant brought an action to subject certain property belonging to the Shelton and Southwestern Railway Company, then in the hands of a receiver, to the payment of a judgment obtained by him against the company prior to the appointment of the receiver, and said action was dismissed, whereupon he took an appeal to this court, and after taking said appeal filed a notice of *lis pendens* with the county auditor. An application was made to the court in said cause to cancel and

Mar. 1898.]

Opinion Per Curiam.

vacate said *lis pendens*, which it appears the court will grant unless restrained by this court, and will further proceed to sell the property in the hands of the receiver. Without passing upon the effect of the *lis pendens* in any way or the effect of an order vacating it, we do not think the facts shown are sufficient to warrant the issuance of the writ. No supersedeas bond was given upon the appeal. It is contended by the petitioner that such a bond would not have protected him in this matter, or at all, except to prevent a mere collection of the costs of suit, but, however this may be, § 6500, Bal. Code (Laws 1893, p. 119, § 1), provides that an appeal from a final judgment may bring up for review any order made in the action either before or after the judgment, etc., and the action of the court in the matter of the *lis pendens* can be reviewed on said appeal. If the same could not be presented in said appeal, a separate appeal could be taken from an order setting aside the *lis pendens*, and in either event a supersedeas bond could be given in the usual manner by applying to the court to fix the amount, and the rights of the petitioner protected. We are not satisfied that the court had no jurisdiction to entertain the subsequent proceeding, under the facts shown here.

Writ denied.

[No. 2843. Decided March 19, 1898.]

THE STATE OF WASHINGTON, *on the Relation of George H. Dunn, Appellant, v. A. B. DORSEY, as Treasurer of Clallam County, Respondent.*

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—PAYMENT OF WARRANTS ILLEGALLY ISSUED.

The statute (Laws 1897, p. 411, § 135; Bal. Code, § 2435), providing that illegal school warrants which had been validated by a vote of the school district should be paid, in case they had not been taken up by the issuance of funding bonds, only by a special tax levied for the purpose from year to year, and that the current revenues arising from the general school tax and fines should be applied exclusively to current expenses, is in no sense void as impairing the obligation of contracts.

Appeal from Superior Court, Clallam County.—Hon. JAMES G. McCLENTON, Judge. Reversed.

James Stewart, for appellant.

George C. Hatch, for respondent.

The opinion of the court was delivered by

SCOTT, C. J.—This is a proceeding in mandamus to compel payment of a warrant held by the relator issued by school district No. 7 of said county. Payment was resisted on the ground that there were prior warrants first entitled to be paid more than sufficient to exhaust the funds. It appears that these prior warrants were originally invalid, as issued in excess of the limit without an authorization of the voters of the district, no election having been held for such purpose. But prior to the issuance of the warrant here in question they were validated under the provisions of the act, Laws 1897, p. 356, §§ 128 to 135 inclusive (Bal. Code, §§ 2398-2405). The directors under-

Mar. 1898.] Opinion of the Court—Scott, C. J.

took to issue bonds under §§ 132 and 134, but were unable to sell them and only succeeded in exchanging them for warrants to the extent of \$1,000, whereby a large amount of said warrants are still outstanding. These matters are all conceded, and the contention is on the part of the respondent that the holders of such warrants are not compelled to surrender them for the bonds as provided in § 134, but that their validation relates back to the time of their issuance, and that they are entitled to payment from moneys otherwise generally accruing to the district before any part of it can be applied in payment of current expenses as provided in § 135, and that this section is to that extent unconstitutional, and this is the sole question presented. The lower court sustained the respondent and this appeal was taken. It is contended that the provisions of § 135 relating to their payment impairs the obligation of the contracts. But we cannot adopt that view. It is conceded that these prior warrants, issued in excess of one and one-half per cent. of the taxable property of the district without being authorized by a vote, were invalid and created no liability against the district, and we adopt that concession for the purposes of this case. The election validating them was held under the act aforesaid, and that act provided and limited the remedy. If the bonds were not sold nor the warrants exchanged for them that section provides for a special tax levy from year to year to pay them, and no sufficient reason has been presented to us for holding it invalid. The case of *Williams v. Shoudy*, 12 Wash. 362 (41 Pac. 169), related to a different act, and the principle there decided is not decisive of this case. The district here could have refused to validate the warrants at all and it is fair to assume would have done so, if by validating them it would have been deprived of using any of its general moneys for current expenses for a long time. The

obligation of no contract has been impaired in any sense in confining their payment to the way specified in the act, and if the act does not govern in such particulars it should be held that there has been no validation at all. But we are of the opinion that the act is a valid one.

Reversed and remanded, with instructions to issue the peremptory writ.

ANDERS and REAVIS, JJ., concur.

[No. 2889. Decided March 19, 1898.]

THE SPOKANE AND EASTERN TRUST COMPANY, v. C.
W. YOUNG, *as Treasurer of the State of Washington.*

INTEREST ON STATE WARRANTS—RATE.

Under § 3 of the act of March 20, 1895 (Laws 1895, p. 349; Bal. Code, § 3670), providing that all state warrants shall draw interest at a rate not greater than eight per centum per annum, unless a less rate be specified therein, the state treasurer must pay eight per centum on state warrants issued subsequent to the passage of the act, and which contain no provision as to the rate of interest, although another section of the same act provides that the legal rate shall be seven per cent as to private contracts, where no different rate is agreed to in writing.

Original Application for Mandamus.

Alex. M. Winston, and Miles Poindexter, for plaintiff.

Thomas M. Vance, Assistant Attorney General, for respondent.

Haight & Owings, as amici curiae.

Per Curiam.—The relator is the owner of a state warrant issued subsequently to the taking effect of the act, Laws 1895, p. 349 (Bal. Code, §§ 3668-3672). No rate

Mar. 1896.]

Opinion Per Curiam.

of interest is specified in such warrants. This one is included in a late call for payment and the treasurer refuses to pay more than seven per cent. interest thereon, and the sole question presented is whether it bears interest at that rate or at eight per cent. per annum. Section 1 provides a rate of seven per cent. as to private parties when no different rate is contracted for. Section 3 is as follows:

“All state, county, city, town and school warrants, and all warrants or other evidences of indebtedness drawn upon or payable from any public funds, shall bear interest at a rate not greater than eight per centum per annum, unless a less rate be specified therein.”

One contention is that this section is so ambiguous and conflicting that it would be inoperative as providing for a rate of eight per cent. where no rate is specified in the instrument, and that it must be ignored, and there is also some contention as to what it does mean. By consent of parties a brief has been filed by local counsel which supports the contention of the relator. It purports to set up the facts relating to the history of the bill while it was pending in the legislature, it being stated that they were matters which the plaintiff's counsel herein, who reside at a distance, could not well know. It is alleged that § 3 of the bill originally provided a rate of seven per cent., but that the words “the rate of seven” which immediately preceded “per centum” were stricken, and the words, “a rate not greater than eight,” substituted, and that this was one of those hurried amendments adopted at the very last of the session, and the language was not otherwise remodeled to make it conform to the amendment. While this might have a bearing as showing an intention to provide a rate of eight per cent. where no other was specified, and which might be conclusive as to state warrants, there being no power in any officer or board to fix a lesser rate, we would

not in any event be disposed to give it a controlling effect. Only in very exceptional cases, at most, should resort be had to matters outside the official publication of the laws as passed, to determine the construction to be given them. It is further shown, however, that soon after the act was passed, the attorney general was called upon by the state treasurer to construe it in this particular, and he rendered an opinion holding that the rate as to state warrants was fixed by the act at eight per cent. While, of course, this construction by the executive branch of the government is not controlling, it is entitled to considerable weight in determining the intention of the legislature in the premises, in view of the fact that it was generally understood thereafter that such warrants bore eight per cent., the same as formerly, and there has been a session of the legislature since then and no change made. But aside from all this, unless § 3 provides a rate of eight per cent. on state warrants it is meaningless in that particular, and the act should be construed to give effect to each part. The intention clearly was to provide a rate of eight per cent. upon state and municipal warrants where a lower rate was not specified therein. The fact that there was no officer or board empowered to fix a less rate from time to time, or at all, as to state warrants, which could be done by a city council or municipal board in the case of municipal warrants, may have been overlooked. But this could not alter the effect of the plain provision otherwise, and consequently as to state warrants the act fixed or continued the former rate of eight per cent., and the writ should issue.

Mar. 1898.] Opinion of the Court — Scott, O. J.

[No. 2750. Decided March 21, 1898.]

19	125
19	159

S. C. MUNSON, *Appellant*, v. EXCHANGE NATIONAL BANK,
Respondent.

ANCILLARY ADMINISTRATION — NECESSITY FOR — ASSIGNMENT OF PROM-
ISSORY NOTE — RIGHTS OF ASSIGNEE.

An assignee of an administrator appointed in one state may bring an action in another without administration being first had in the latter state.

Under the rule that the assignment of a chose in action passes the whole interest of the assignor therein, including every remedy and security available by the assignor as incident thereto, although not specially named in the instrument of assignment, the assignment of a promissory note by an administrator would pass to the assignee a right of action for damages, which had accrued during the lifetime of the decedent by reason of the negligence of a bank, to which the note had been delivered for collection, in failing to notify the indorsers of its non-payment at maturity.

Appeal from Superior Court, Spokane County.—Hon. WM. E. RICHARDSON, Judge. Reversed.

Samuel R. Stern, for appellant.

C. S. Voorhees (*Jones & Voorhees*, of counsel), for respondent.

The opinion of the court was delivered by

SCOTT, C. J.—This action was brought to recover upon substantially the following state of facts. One Rundel executed a note to one Ross, who thereafter indorsed it to one Harrington, and Harrington indorsed it to one Elizabeth Flint. Prior to the maturity of the note said Flint sent it to the defendant for collection, and the defendant undertook to collect it according to the law and custom; but it is alleged that the defendant negligently failed to

notify the indorsers of said note of its non-payment at maturity, and failed to protest the same, by reason whereof the indorsers were released from liability. It is further alleged that Ross was solvent, but that Rundel and Harrington were insolvent. After the maturity of the note said Elizabeth Flint died at her place of residence, which was in Boston, Massachusetts, and it is alleged that one Angie Shepard was appointed administratrix of her estate by the probate court of Suffolk county in said state, and that she duly assigned and transferred the note to the plaintiff, together with all right, title and interest of the estate therein and all causes of action or rights whatsoever growing out of the same, and particularly the cause of action against the defendant for its failure to present the note as aforesaid. The defendant answered, but when the cause was called for trial a motion was made to dismiss it on the ground that the facts stated were not sufficient to base an action upon, the particular point being that an assignee of a foreign administratrix could not sue in this state without administration being first had here, and the motion was granted, whereupon the plaintiff appealed.

There is no question of a conflict of jurisdiction nor does it appear that the deceased had any property in this state, or owed any debts here, and we are of the opinion that under the decided weight of authority the court erred in dismissing the action. Our statutes permit an assignee to sue in his own name. It is practically conceded by the respondent that a direct action upon the note might have been maintained by the assignee, but that the same rule does not follow with reference to this action. Under the general rule, by an assignment of a chose in action the whole interest of the assignor therein passes with it, including every remedy and security available by the assignor as incident thereto, although not specially named in the instrument

Mar. 1898.]

Syllabus.

of assignment. 2 Am. & Eng. Enc. Law (2d ed.), p. 1084. It is alleged here that this particular cause of action was expressly included in the assignment, but we think it would have passed with a general assignment of the note. The rule that an assignee of an administrator appointed in one state may bring an action in another is so generally settled and recognized that it is needless to cite many authorities. See *Petersen v. Chemical Bank*, 32 N. Y. 21 (88 Am. Dec. 298); 3 Williams, Executors, 476; *Campbell v. Brown*, 64 Iowa, 425 (52 Am. Rep. 446, 20 N. W. 745); *Mackay v. St. Mary's Church*, 15 R. I. 121 (2 Am. St. Rep. 881, 23 Atl. 108); *In re Waite*, 99 N. Y. 433 (2 N. E. 440); 1 Woerner, American Law of Administration, § 162.

Reversed and remanded for a new trial.

DUNBAR, ANDERS, GORDON and REAVIS, JJ., concur.

[No. 2880. Decided March 21, 1898.]

H. C. BLAIR, *Respondent*, v. JOHN R. CASSIN, *Appellant*.

APPEAL — DAMAGES — ACTION ON BOND.

Where it cannot be determined from the record what amount of damages respondent is entitled to recover for the detention of property pending an appeal, held by appellant by virtue of a supersedeas bond, no damages will be allowed in giving judgment against appellant, but the respondent will be left to an action upon the bond.

Appeal from Superior Court, Spokane County.—Hon. WM. E. RICHARDSON, Judge. Appeal dismissed.

Blake & Post, for respondent.

Per Curiam.—Respondent moves to affirm the judgment herein and for damages because of the failure of the appellant to prosecute his appeal within the time provided by statute. The motion to affirm must be granted, there having been no cause shown for the failure to comply with the statute in filing briefs and sending up the transcript. But it appears that by the judgment in the lower court the appellant was ordered to surrender the possession of certain real estate and that in appealing therefrom he gave a supersedeas bond, but, as we cannot determine from the record what amount of damages should be recovered for the detention of the property pending the appeal, none can be allowed in the disposition of this motion, but the plaintiff will be left to an action upon the bond. *Northwestern & P. H. Bank v. Griffiths*, 18 Wash. 69 (50 Pac. 591).

[No. 2888. Decided March 23, 1898.]

THE STATE OF WASHINGTON, *on the Relation of John M. Boyle*, v. SUPERIOR COURT OF PIERCE COUNTY.

PROHIBITION TO SUPERIOR COURT—VACATION OF JUDGMENT—PROCEDURE.

Prohibition will lie to restrain a court from vacating its own judgment on the ground of irregularity in that there is no proof of service of summons upon defendants of record, when the judgment itself contains a recital of due service and there is no showing in support of the motion to vacate that process had not in fact been served.

A court has no authority to vacate its judgment on motion made therefor years after its rendition, but the defendant must proceed by an action in equity to set aside the judgment. (ANDERS, J., dissents.)

Original Application for Prohibition.

A. R. Titlow, for relator:

19	128
34	120
634	121
19	128
36	106
19	128
37	436
637	438

Prohibition will be granted against an inferior court by the supreme court, where the inferior court is attempting to act to the injury of the party from the want of jurisdiction or in excess of its jurisdiction, and where there is no adequate remedy for the complaining party. *State ex rel. Rochford v. Superior Court*, 4 Wash. 36; *State ex rel. Cummings v. Superior Court*, 5 Wash. 519; *North Yakima v. Superior Court*, 4 Wash. 655; *State ex rel. Schloss v. Superior Court*, 3 Wash. 701; *State ex rel. Machinery Co. v. Superior Court*, 7 Wash. 80; *State ex rel. Dodge v. Langhorne*, 12 Wash. 588.

Though the recital in a judgment that defendant was duly summoned is, in the absence of the affidavit of service, only *prima facie* evidence of that fact, yet, when the judgment is directly attacked it must be repudiated before the judgment will be set aside. *Whitney v. Daggett*, 41 Pac. 471. The court has jurisdiction to enter the judgment even though at the time summons with proof of service had not been filed with the clerk. *Hibernian S. & L. Soc. v. Matthai*, 48 Pac. 370, and cases therein cited. A judgment reciting that the defendants were duly and regularly served and cited to appear, and that they made default, is an adjudication upon those points as conclusive upon all parties as any other fact at issue. *Kizer v. Caulfield*, 17 Wash. 417. Every fact not negatived by the record will be presumed in aid of the judgment, and it will only be held void when it affirmatively appears from the record that the court had no jurisdiction to render it. *Munch v. McLaren*, 9 Wash. 676. The decree reciting that the summons and complaint had been duly served, will not be contradicted by the presence in the record (as in this case) of a summons without a return of service. *Rogers v. Miller*, 13 Wash. 86 (52 Am. St. Rep. 20); *Christofferson v. Pfennig*, 16 Wash. 491.

Stiles & Harvey, for respondent:

A superior court in this state has the power, on motion, to set aside a default judgment theretofore entered by it, if that judgment is on its face, or on the face of the judgment roll, void for want of service of the summons on the defendants. *Freeman*, Judgments (3d ed.), § 98; *Harris v. Hardeman*, 14 How. (14 Law. ed.) 334; *Hallett v. Righters*, 13 How. Pr. 43; *People v. Harrison*, 24 Pac. 311; *Reinhart v. Lugo*, 24 Pac. 1089 (21 Am. St. Rep. 52); *McKinlay v. Tuttle*, 42 Cal. 571; *People v. Greene*, 74 Cal. 400 (5 Am. St. Rep. 448); *People v. Pearson*, 76 Cal. 400; *In re City of Buffalo*, 78 N. Y. 362. The power of a court to vacate a void judgment does not expire by lapse of time. 6 Enc. Pl. & Pr. 193, and note 3. The proof of service is a part of the record and will, if insufficient, overcome recitals in the judgment. *Hallett v. Righters*, 13 How. Pr. 43; *Laney v. Garbee*, 105 Mo. 355 (24 Am. St. Rep. 391); *Clark v. Thompson*, 47 Ill. 25 (95 Am. Dec. 457); *Senichka v. Lowe*, 74 Ill. 274; *Harris v. Hardeman*, 14 How. (14 Law. ed.) 334.

A void judgment may be ignored at any time the plaintiff undertakes to assert any rights thereunder; or it may be appealed from; or a motion will lie at anytime, on behalf of the defendant, to vacate it and set it aside. 12 Am. & Eng. Enc. Law, pp. 1470, 307; *Foreman v. Carter*, 9 Kan. 674; *Hervey v. Edmunds*, 68 N. C. 243; *Howard v. Galloway*, 60 Cal. 10; *Lyhans v. Cunningham*, 66 Cal. 42; *Russell v. Grant*, 122 Mo. 161 (43 Am. St. Rep. 563); *Hawkins v. Hawkins' Adm'r*, 28 Ind. 66; *Weis v. Schoerner*, 53 Wis. 72; *Ferguson v. Crawford*, 70 N. Y. 253 (26 Am. Rep. 589).

The opinion of the court was delivered by

SCOTT, C. J.—This is an application for a writ to pro-

hibit the respondent from vacating a judgment rendered in January, 1894, in favor of the Tacoma National Bank, as plaintiff, against Otis Sprague and Mave H. Sprague, husband and wife, defendants, the relator being now the owner of the judgment. The judgment contained a recital that each of the defendants "was duly served with a copy of the summons and complaint" and that each of them had failed to appear within the time prescribed. On the 25th day of February last the defendants appeared specially and moved to vacate the judgment, serving notice of the motion on the relator and the attorney of record of the plaintiff. The motion to vacate was on the ground that there was no proof of the service of the process. There was no allegation nor showing that the process had not in fact been served. There was a document on file in the form of an affidavit showing personal service of the process upon each of the defendants. The same was not sworn to, and the contention of the respondent is that it must be presumed that this was the only proof of service made, and, it not being sworn to, that the judgment was void. We think under the holdings of this court in *Rogers v. Miller*, 13 Wash. 82 (42 Pac. 525); *Christofferson v. Pfennig*, 16 Wash. 491 (48 Pac. 264), and *Kizer v. Caulfield*, 17 Wash. 417 (49 Pac. 1064), the presumption must be that there was a valid service. This document might in fact have been sworn to in open court before the judge at the time the judgment was taken. Although it was irregular not to have proof of service appear of record, this would not affect the jurisdiction of the court to render judgment. Furthermore, we do not think the court would have any authority years after the rendition of this judgment to vacate it upon a mere motion like the present one. The plaintiff, or its successor in interest, was not before the court for any such purpose and could only be brought in after this lapse of time by the service of pro-

cess. A bill in equity, or perhaps a petition, would lie to set aside the judgment, but in such case the plaintiff or the party in interest would have to be legally brought in by service of process, and just cause for setting aside the judgment would have to be shown; for instance, that the process in fact had not been served, and this alone might not be sufficient, for a party is bound to proceed with reasonable diligence. It is also alleged in this case that the defendants have recognized the judgment by making several payments upon it. We think a good cause is shown for the issuance of the writ. *State ex rel. Nolte v. Superior Court*, 15 Wash. 500 (46 Pac. 1031); *State ex rel. Dodge v. Langhorne*, 12 Wash. 588 (41 Pac. 917).

Writ granted.

GORDON and REAVIS, JJ., concur.

ANDERS, J.—I think the judgment sought to be set aside in this case was not void, for the reason that the recital therein that the defendants were duly served with a copy of the complaint and summons, is not contradicted by anything appearing to the contrary in the record. In such cases the recital is itself an adjudication of the fact recited. But I am of the opinion that a void judgment may be set aside at any time on motion; and I therefore concur in the result.

Mar. 1898.]

Argument of Counsel.

[No. 2810. Decided March 24, 1898.]

D. R. NOBLE *et ux.*, Respondents, v. CITY OF SEATTLE,
Appellant.

DEATH BY WRONGFUL ACT—PARTIES—CONSTRUCTION OF TERM "HEIRS."

Under Code Proc., § 138 (Bal. Code, § 4828), giving a right of action to heirs of any person whose death is caused by the wrongful act or neglect of another, the term "heirs" must be restricted to the widow and children of deceased, and does not include parents or collateral relatives, in view of the facts that another provision of the same section confines the right of recovery to "the widow or widow and her children, or child or children, if no widow;" that Code Proc., § 139 (Bal. Code, § 4829), gives a right of action to parents or guardian for death of a minor child or ward; and that Code Proc., § 148 Bal. Code, § 4838), provides that no action for personal injury occasioning death shall abate, but the right of action shall survive in favor of the wife and children. (DUNBAR, J., dissents.)

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Reversed.

John K. Brown, and *F. B. Tipton*, for appellant.

G. H. Fortson, for respondents:

Other states having statutes somewhat similar to those of Washington allow recoveries by parents of adult children. *Denver S. P. Co. v. Wilson*, 20 Pac. 341; *Railroad Co. v. Berron*, 5 Wall. (18 Law. ed.) 90; *Barnum, Adm'r, v. Chicago, M. & St. P. Ry. Co.*, 16 N. W. 364; *Schwartz, Adm'r, v. Judd*, 10 N. W. 208; *Southern Pac. Co. v. Lafferty*, 57 Fed. 536; *Ohio & M. Ry. Co. v. Wangelin*, 38 N. E. 760; *Colorado Coal & Iron Co. v. Lamb*, 40 Pac. 251; *Missouri Pac. Ry. Co. v. Henry*, 12 S. W. 828. Under a similar statute in Texas, the mother of a married woman who receives support from her may sue for damages. *Gulf, C., & S. F. Ry. Co. v. Southwick*, 30 S. W. 592.

19	133
222	099

19	133
26	489
28	490

19	133
33	430

19	133
234	407
234	408

19	133
230	212
230	212
230	214

The opinion of the court was delivered by

GORDON, J.—The respondents, father and mother respectively of Judson D. Noble, deceased, brought this action to recover damages for his death, claiming that it was caused by the negligent, careless and wrongful act of the city in not keeping one of its streets in a safe condition for public travel. It appears from the record that in passing over a street in the city of Seattle known as Railroad avenue, which runs along the water front, the deceased fell through the planking and was drowned. The deceased at the time of his death was over the age of 21 years, had never been married, and left neither wife nor child. Respondents have been divorced for a number of years, and reside in different states. By way of an affirmative defense the answer contained the following allegation:

“And for a further answer and as new matter constituting a second affirmative defense to said second amended complaint the defendant alleges that said Judson D. Noble at the time of his death was over the age of twenty-one years, and that he left surviving him no widow, or child, or other descendant.”

A demurrer to this defense was sustained by the lower court, and this ruling constitutes one of the errors argued and assigned on this appeal. Section 138 of 2 Hill's Code, (Bal. Code, § 4828) is as follows:

“Sec. 138. The widow, or widow and her children, or child or children if no widow, of a man killed in a duel, shall have a right of action against the person killing him, and against the seconds and all aiders and abettors. When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or when the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square or wharf,

Mar. 1898.] Opinion of the Court—GORDON, J.

his heirs or personal representatives may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every such action the jury may give such damages, pecuniary or exemplary, as under all circumstances of the case may to them seem just."

Section 139, 2 Hill's Code (Bal. Code, § 4829), gives the right of action to a father or mother and guardian for death, by a wrongful act, of a minor or ward. It is the contention of the appellant that the word "heirs," as used in § 138, does not include parents or collateral relatives, but only includes the widow and child or children of the person whose death is caused by the wrongful act of another. In support of this contention it is pointed out that by the plain terms of the statute the right of action is specifically limited to the widow and child or children of a man killed in a duel, and it is urged that there can be no sound reason for denying it, as to the parents in that case, and conferring it upon them in the case of death by wrongful act. As pointed out by this court in *Atrops v. Costello*, 8 Wash. 149 (35 Pac. 620), the first part of § 138, as contained in the present code, was enacted in 1873, and the remainder of the section as now found in the code was not enacted until 1875, when the legislature enacted it as an additional section. The question here presented has never been decided by this court, and because of the dissimilitude between the various statutory provisions on the subject the cases decided elsewhere are of little value. There is a greater similarity between these provisions of our own statute and those of the state of Kentucky relating to the same subject than we have been able to find elsewhere; and in a long line of decisions in that state it is held that the word "heirs" does not include parents or collateral relatives. *Henderson's Adm'r v. Kentucky Central R. R.*

Co., 86 Ky. 389 (5 S. W. 875); *Jordan's Adm'r v. Cincinnati, N. O. & T. P. Ry. Co.*, 89 Ky. 40 (11 S. W. 1013); *Henning's Adm'r v. Louisville Leather Co.*, 12 S. W. 550; *Louisville & N. R. Co. v. Coppage*, 13 S. W. 1086.

Section 3, ch. 57, Gen. Stat. Ky., provides that

"If the life of any person is lost or destroyed by the willful neglect of another person, . . . company or corporation, . . . then the *widow, heir, or personal representative* of the deceased shall have the right to sue," etc.

Commenting upon this statute, the court in *Henderson's Adm'r v. Kentucky C. R. Co.*, *supra*, say:

"No others sustain as near a relation to, are so dependent upon, or have the same legal right to look for a support to a person as his wife and children, especially those of the latter who may be minors. Therefore, the injury resulting from his death at the hands of another to them is actual and direct, while to his collateral heirs it is remote and not immediate, and as to creditors it may not exist at all. *We are unable to perceive any reason for giving to the widow and minor child the exclusive right to sue for and recover damages for the loss of the life of a person in a duel, or by the careless or malicious use of firearms, that does not apply with equal force when it is destroyed by willful neglect.* In each case the widow and child have been deprived of the society and support of the husband and father by the criminal or *quasi* criminal act of another. And, whether the injury has been done in one or another of the three modes denounced in the statutes, the consequences to them are the same, and it would seem they ought to be entitled to the same reparation.

"Therefore, looking to the reason for the statutory right to sue and recover damages for the destruction of the life of one person by the act of another, and to the necessity, when it can be properly done, of so construing each part of the General Statutes as to preserve the consistency of the whole, we are of the opinion that the widow and child or children have the prior right to sue for, and the exclusive right to what may be recovered in an action author-

ized by section 3, chapter 57. And though the right to institute such an action is given to the personal representative, we think, for the reasons indicated, he can exercise that right only for the use and benefit of the widow and child if there be any. It is, we think, also evident that the word 'heir' was intended to mean 'child,' and not to apply to any other description of person.

"What proportion of the amount recovered the widow and children may be respectively entitled to, whether the right belongs to adult as well as minor children, and whether the personal representative may maintain such an action in case there be neither widow nor child of the person whose life has been so destroyed, are questions not involved in this case, and not decided."

In *Jordan's Adm'r v. Cincinnati, N. O. & T. P. Ry. Co.*, *supra*, the action was by the administrator, and in the answer it was pleaded in bar of the recovery that deceased left no widow or child. To this the plaintiff replied that the deceased left as heirs a father, mother, sister and brother. Upon the question thus presented the court say:

"No person has a legal cause of action against another for a wrongful or negligent act, and it may be safely said legislative power to give it does not exist, unless he has sustained pecuniary injury by it. For the foundation of every action for a tort is actual pecuniary injury, without which there can be legally assessed neither compensatory nor punitive damages. It seems to us clear it was not intended that creditors of the deceased should have any part of what may be recovered under section 3, chapter 57, and that the personal representative can maintain an action for the cause therein mentioned, only for the use of the widow and heir. . . . As, then, the widow is entitled to maintain such action, and, as a necessary consequence, to share with the heir what is recovered, the single question to be determined is, what meaning the legislature intended to be given to the word 'heir,' as therein used. It must be either so limited as to mean 'child' or so extended as to include collateral kindred of the deceased, however remote,

if it can be fairly applied to them at all; for the right to sue for and recover punitive, which presupposes also compensatory damages, is given by the statute without condition or qualification."

And the court concludes that the word 'heir' as used in their statute means 'child' and "does not include parents or collateral relatives."

We have quoted at length from these cases because in our judgment they are peculiarly applicable to the one we are considering, and we have been unable to find any others that are. It is familiar law that interpretation may contract as well as expand the meaning of words used in a statute, when the harmony of the legal system so requires. That it was the intention of the legislature to limit the right of action in cases like the present to those heirs, and only to those heirs, to whom the deceased while living owed the legal duty of support, is further evidenced by § 148, 2 Hill's Code (Bal. Code, § 4838), which is as follows:

"Sec. 148. No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine by reason of such death if he have a wife or child living, but such action may be prosecuted, or commenced and prosecuted, in favor of such wife, or in favor of the wife and children, or if no wife, in favor of such child or children."

It is true that that part of § 138 which gives rise to the present controversy was passed subsequently to § 148, *supra*, but we do not think that the latter section was thereby repealed. In the first place there are no express words of repeal, and it ought not to be construed as working any change further than its direct terms require. There is no direct conflict between the acts and "presumption has no room to work."

We do not think that §§ 3088 and 3089, 1 Hill's Code (Bal. Code, §§ 376, 377), have any bearing on this case. In substance, they require children to support their indigent parents. The obligations which these sections impose do not extend to all heirs, but only those in close relationship with the indigent person. For instance, a nephew is not required to support his uncle, and yet if the word "heirs," as used in § 138, *supra*, is to be rendered literally, not only nephews but many other heirs can maintain actions like the present.

While in general the term "heirs" includes collateral kindred and those who take under the statute of distribution we think that in view of the entire legislation upon the subject it never was intended that parents or remote ancestors might maintain actions like the present, and that the word "heirs" as used in § 138 should be held to include only those persons who are thereinbefore specifically mentioned, viz.: "The widow, or widow and her children, or child or children if no widow." It follows that the demurrer was improperly sustained. The other assignments require no attention.

The judgment appealed from is reversed and the cause remanded with direction to the lower court to overrule the demurrer.

SCOTT, C. J., and ANDERS and REAVIS, JJ., concur.

DUNBAR, J.—I dissent. I think the right is conferred by the plain language of the statute, which is not susceptible of construction.

[No. 2703. Decided March 26, 1898.]

AMOS F. TULLIS, *Appellant*, v. THE TACOMA LAND
COMPANY, *Respondent*.

LANDLORD AND TENANT—TIDE LANDS—RIGHT TO PURCHASE.

A tenant of tide lands holding under lease from the upland owner could not, in the absence of fraud, acquire a prior right of purchase, under Gen. Stat., § 2172, as against his landlord, by making improvements thereon prior to March 26, 1890, even though the lessor had never been in actual possession of the tide land, if the lessee had no other claim of title than his possession under the lease.

Appeal from Superior Court, Pierce County.—Hon. THOMAS CARROLL, Judge. Affirmed.

Henry Bucey, Henry Ford, and John C. Stallcup, for appellant:

A lease of land the title to which remains in the government is void and courts will take judicial notice of same. Such a lease is either *mala prohibita* or *mala in se*. A lessee is not estopped to deny his lessor's title when the land leased was public land, which is not subject of lease without right from the state. *Welder v. McComb*, 30 S. W. 822; *Sedgwick & Wait, Trial of Title*, § 851; *Dupas v. Wassell*, 1 Dill. 213; *Uhlig v. Garrison*, 2 Dak. 71; *Borland v. Box*, 62 Ala. 87; *Tribble v. Anderson*, 63 Ga. 31; *Satterlee v. Mathewson*, 16 Pa. St. 169; *Gear, Landlord & Tenant*, 166; *Taylor, Landlord & Tenant*, 86, 707.

Sullivan & Christian, and Crowley & Grosscup, for respondent:

In this case the lessee admits that he took possession un-

Mar. 1898.] Opinion of the Court—REAVIS, J.

der the lease, went into possession after the lease was executed, paid rent until April, 1893, and has never surrendered the possession of the premises, or offered to surrender the same to the lessor. He does not claim to be the owner of a paramount title existing at the time the lease was made, but that at the time the lease was executed the tide lands were held in trust for the future state. Certainly the appellant, not having been in possession of the premises at the time the lease was executed, in the absence of fraud, could not, under the great weight of authority, deny the existence of estoppel against himself. *Hagar v. Wilkoff*, 39 Pac. 281; *Ricketson v. Galligan*, 89 Wis. 394; *Burgess v. Rice*, 74 Cal. 590; *Eckles v. Booco*, 11 Colo. 522; *School District v. Long*, 10 Atl. 769; *Ward v. Philadelphia*, 6 Atl. 263; *Tilyou v. Reynolds*, 108 N. Y. 558; *Voss v. King*, 33 W. Va. 236; *Hamilton v. Pittock*, 27 Atl. 1079; *Killoren v. Murtaugh*, 64 N. H. 51; *Parrott v. Hungelburger*, 9 Mont. 526; *California & O. Land Co. v. Munz*, 29 Fed. 837.

The opinion of the court was delivered by

REAVIS, J.—Appellant and respondent each filed an application to purchase certain tide lands of the first class lying in front of the city of Tacoma with the Board of State Land Commissioners, appellant claiming the right to purchase as an improver and respondent as upland owner. The board of land commissioners awarded the right to purchase to respondent and appeal was taken therefrom to the superior court of Pierce county, and respondent awarded the right to purchase by that court, from which judgment an appeal was taken by appellant to this court. Respondent has moved to dismiss the appeal upon several grounds relating to the regularity of the appeal from the board of state land commissioners to the superior court. Upon re-

viewing the record brought here we conclude the appeal can be maintained. Therefore the motion to dismiss is denied.

A number of errors are assigned by appellant, but the main contention between the parties, and the one which we think is decisive of the cause, is the relation existing between appellant and respondent at the time appellant's improvements were placed upon the tide land. Appellant maintains that the testimony shows that he made valuable improvements upon the tide land in question for the purposes of trade, commerce and business, prior to March 26, 1890, which improvements consisted of piling, capping, planking and filling, and the erection of two warehouses thereupon, and this fact is found by the superior court. But the superior court also found that the only improvements made by appellant and his associate Birmingham were made and placed upon the premises under a certain lease made the 20th of November, 1888, between respondent and appellant and Birmingham, in which respondent was lessor and appellant and Birmingham were lessees of the tide lands in controversy; that at that time the respondent was the owner of all the upland abutting and fronting on the tide lands in question, and that the respondent delivered the possession of such tide lands to appellant and Birmingham as their lessees; that no improvements of any character were made on said tide lands by appellant or Birmingham before the execution and delivery of the lease and the entering into possession under the lease, and that neither appellant nor Birmingham was ever in possession of such tide lands or any part thereof prior to the delivery and execution of the lease; that appellant and Birmingham after the execution and delivery of the lease and the erection of the improvements continued to pay rent to the respondent under the terms of the lease down

Mar. 1898.]

Opinion of the Court—REAVIS, J.

to, and including, the month of April, 1893; that appellant, who is the assignee of Birmingham, never at any time since the execution and delivery of the lease surrendered or offered to surrender the possession to the respondent, and that appellant was still in possession of such tide lands on the 15th of October, 1895, when he made application to purchase, and that he was still holding possession of the premises under and by virtue of the lease and not otherwise. The court also finds that no false or fraudulent representations of any kind were made by respondent or its officers or agents to appellant or Birmingham, its lessees, at or before the execution and delivery of the lease. After an examination of the testimony we cannot say that the findings of the superior court are incorrect. It is true the finding that the lessees went into possession of the tide lands in controversy under the terms of the lease is founded upon the fact that the lease was executed prior to the entry of the lessees upon the premises and that the lease itself declares among its other recitations:

“Whereas, the said lessor is now in the undisturbed and unqualified possession of the land hereinafter described, and

“Whereas, the said lessees are desirous of hiring the possession of said lands from the lessor,

“Now, this lease, witnesseth,” etc.

The lease contains a clause that the lessees hire the premises to be occupied and used solely by them for the purpose of erecting thereon a wharf, warehouse and feed-mill, and that the premises shall not be used for any other purpose. The lessees also covenant in the lease that in any legal or equitable proceedings involving the rights expressed or implied under the terms of the lease the lessees covenant and agree to and with the lessor that they expressly admit

the ownership in fee of the lessor's successor or assigns of the tide lands embraced in the lease.

The only question, then, to consider is whether the tenant can dispute the covenant contained in the lease. As we have seen from the findings of the superior court there is no element of fraud involved in the execution or the delivery of the lease. It is maintained by counsel for appellant that this case can be distinguished from a number of cases heretofore decided by this court maintaining the general rule that, if a tenant has once recognized the title of a plaintiff and treated him as his landlord by accepting a lease from him, the tenant is precluded from showing that the plaintiff had no title at the time the lease was granted, in this, that the former cases here arose under a different state of facts, i. e., where the landlord delivered actual possession to the tenant or there was no proof at the trial upon the question of actual possession at the time of the execution and delivery of the lease; and it may be said that every phase presented by the case at bar has been before this court and adjudged against the contention of the appellant, except the single one of proof tendered against actual possession of the landlord at the time of the execution of the lease. And such cases, too, involved almost every nature of a lease to tide lands by the upland owner where the title to such lands was still in the state when the lease was executed. *Hall & Paulson Furniture Co. v. Wilbur*, 4 Wash. 644 (30 Pac. 665); *Colins v. Hall*, 5 Wash. 366 (31 Pac. 972); *McKenzie v. Woodin*, 9 Wash. 414 (37 Pac. 663); *Brown v. Carkeek*, 14 Wash. 443 (44 Pac. 887).

Appellant contends, however, that, under the rule announced in *Tewksbury v. Magraff*, 33 Cal. 237, and other California cases, where the tenant was in possession of the premises at the time when the lease was made, as he did

not enter under the lease from the plaintiff, he is not estopped from disputing the landlord's title. But appellant does not bring himself within the rule announced by the California case, if he was not in possession of the tide land in controversy at the time of the execution of the lease, and in *Peralta v. Ginochio*, 47 Cal. 459, the supreme court of California says, referring to the adjudication in *Tewksbury v. Magraff*, *supra*:

"The rule, in its operation, permits the tenant in such case to dispute his landlord's title, by showing that his is the better title. It is not enough to dispute it by averment, but proof is required on his part. The landlord, by the production of the lease, makes a *prima facie* case, and the burden of proof is cast on the tenant; and unless he overcomes it by showing paramount title in himself, or those under whom he claims, the landlord must prevail."

The record before us does not disclose any proof of any character tending to show that appellant had any title or had procured any title, or had any paramount, or any other, claim of title to the disputed premises. The improver who has a prior right to purchase under the law of 1890 is one who made the improvements for himself and not in subordination to or under any one else. The intention to improve thus must coincide with the fact of improvement.

The judgment of the superior court is affirmed.

SCOTT, C. J., and ANDERS, DUNBAR and GORDON, JJ.,
concur.

[No. 2736. Decided March 26, 1898.]

W. C. BIDWELL, *Appellant*, v. STUART RICE, *as Receiver*,
Respondent.

VENDOR AND PURCHASER — FORFEITURE — RECOVERY OF AMOUNT PAID.

A receiver who, for want of an order of court, has never been in a position to make a conveyance of real estate to one to whom he has contracted to sell it, cannot claim a forfeiture of an installment of purchase money paid under an agreement for its forfeiture in case a second payment was not made within a given time, although no tender of the second installment has been made within the stipulated time.

Appeal from Superior Court, Pierce County.—Hon. THOMAS CARROLL, Judge. Reversed.

Stiles & Harvey, for appellant:

Although the vendee be in default and time be of the essence of the contract, if the vendor cannot perform there is no forfeiture. Warvelle, Vendors, p. 822. If all the payments are due, the vendor must tender performance before he can declare a forfeiture. His silence or inaction is a waiver of his rights. Warvelle, Vendors, p. 824; *Peck v. Brighton Co.*, 69 Ill. 200; *Underwood v. Tew*, 7 Wash. 297; *Hogan v. Kyle*, 7 Wash. 595 (38 Am. St. Rep. 910).

Campbell & Powell, for respondent:

“An option of purchase rests on different grounds, and is governed by different rules from those which obtain in case of bilateral contracts. . . . If the option reserved is to purchase at any time before a certain day, for a certain sum to be paid on demand for deed, time is of the essence of the contract, and equity cannot relieve after the time, nor require the repayment of money paid to secure the option.” 2 Warvelle, Vendors, p. 832, § 16. This state-

Mar. 1898.] Opinion of the Court—REAVIS, J.

ment is fully borne out by the authorities; for time is always of the essence of contracts of this character. *Richardson v. Hardwick*, 106 U. S. 252 (27 Law. ed. 145); *Steele v. Bond*, 32 Minn. 14; *Kerr v. Purdy*, 51 N. Y. 629; *Cummings v. Realty Co.*, 57 N. W. 43; *Harding v. Gibbs*, 125 Ill. 86 (8 Am. St. Rep. 345); *Stembridge v. Stembridge's Adm'r*, 87 Ky. 91; *Schiels v. Horbach*, 30 Neb. 537; *Johnston v. Trippe*, 33 Fed. 530.

Had appellant exercised his option within the sixty days and tendered performance and demanded a deed of the premises, he could have maintained an action for specific performance, in so far at least that this court would have directed the respondent to make an application to a court of record, as prescribed by statute, for leave to sell. *Watts v. Kellar*, 56 Fed. 1; *Love v. Camp*, 51 Am. Dec. 419.

The plaintiff, having had the full benefit of the contract, is estopped from questioning its validity. *Wooding v. Crain*, 10 Wash. 35; *Colcord v. Leddy*, 4 Wash. 791; *Mayor v. Sonneborn*, 113 N. Y. 423; *Buffalo v. Balcom*, 134 N. Y. 532; *Whitney Arms Co. v. Barlow*, 63 N. Y. 71 (20 Am. Rep. 504); *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24.

The opinion of the court was delivered by

REAVIS, J.—Respondent in August, 1893, was appointed receiver of the Washington National Bank, then in liquidation, by the comptroller of the currency of the United States. A part of the assets of the bank consisted of certain real estate known as the "Gig Harbor Mill" property. In November, 1894, appellant and others (who have since assigned their claims to him) entered into an agreement with respondent to purchase the "Mill" property for the sum of \$10,000, of which \$1,000 was to be paid in cash, \$2,000 more on or before the expiration of sixty days, and

the balance on note secured by mortgage to run two years. The one thousand dollars was paid November 9, 1894, and upon the same day respondent executed and delivered to appellant's agents an agreement in writing to the effect that the sum of \$1,000 was received by respondent from appellant's agents for the exclusive option to purchase from respondent the "Mill" property at any time within sixty days from that date, at and for the price of \$10,000, of which sum \$1,000 was in cash received, \$2,000 should be paid to respondent within sixty days and the remaining \$7,000 should be paid by a promissory note for that amount due in two years, with interest secured by a mortgage on the "Mill" property, and upon the performance of the conditions of payment respondent should execute and deliver to appellant's agents a good and sufficient deed of conveyance of the "Mill" property. But if appellant's agents should make default in the payment of the sum of \$2,000 within sixty days, then the sum of \$1,000 should be forfeited to respondent, time being made the essence of the written agreement. The court also found that respondent withdrew the property from sale, and at all times held himself in readiness to carry out his agreement upon payment due him within sixty days of the sum of \$2,000 as part of the purchase price of the property, and upon execution of the mortgage to secure the remainder of the purchase price; that the agents of appellant failed to exercise their option and to elect to purchase the property within the time, and failed to pay or tender to respondent the \$2,000 as part of the purchase price within the time for which the option was granted, and that appellant has not at any time since the option was granted tendered or paid to respondent any sum whatever as a part of the purchase price of the property; that in the month of July, 1895, respondent sold and conveyed the "Mill" property to third persons. The court

also found that the respondent at no time either before or since the execution of the contract of sale had authority from any court of record to sell or convey the real property to appellant. After the execution of the conveyance of the "Mill" property by respondent to third persons appellant demanded repayment of the \$1,000, which was refused by respondent, and this action was instituted by appellant to recover the \$1,000 so paid.

Several points are presented upon this appeal and argued by counsel, and the nature of the contract is in contention between the respective parties, respondent maintaining that appellant paid the \$1,000 for a mere option to purchase within sixty days. The appellant contends that the receiver had no power to grant an option, that he could only sell under an order of the court. The findings of fact made by the superior court are accepted by both parties and no exceptions have been taken to them. It is evident from the facts found that the one thousand dollars did not pass to the respondent absolutely, as is ordinarily the rule in paying for an option on real property. It was a part payment of the purchase price, if the contract between the parties was consummated, and it was under the terms of the contract to be forfeited to the respondent if the \$2,000, the second payment under the terms of the contract, was not made within sixty days. There was, then, some default of appellant to be noted before the forfeiture. The stipulation of appellant to pay the \$2,000 within sixty days was interdependent with another stipulation of the respondent to execute a conveyance of the "Mill" property within sixty days or at the time of the payment of the \$2,000, and while the superior court has found that the respondent held himself in readiness to carry out the agreement within the sixty days, that court has not found that respondent had the ability to carry out the contract with-

in sixty days. On the contrary, it was found that respondent had at no time, either before or after the execution of the contract, authority from any court of record to convey the property to appellant and associates. Thus it would have been an idle act for appellant to have tendered the second payment of \$2,000 on the purchase price, for respondent could not make such conveyance. But some six months thereafter respondent procured the authority to sell and executed a conveyance to third persons. Evidently appellant was relieved against any default in the non-performance of the conditions of the agreement, and the forfeiture of the \$1,000 paid to respondent could not be claimed by him; and respondent having finally disqualified himself from performance of his contract with appellant and associates cannot withhold re-payment of the \$1,000 to which he has no right under the terms of his contract. These considerations dispose of the cause, and the judgment of the superior court is reversed with direction to enter judgment therein for appellant in conformity to this opinion.

SCOTT, C. J., and DUNBAR, ANDERS and GORDON, JJ.,
concur.

[No. 2740. Decided March 26, 1898.]

THE WEST PHILADELPHIA TITLE AND TRUST COMPANY, *Respondent*, v. THE CITY OF OLYMPIA *et al.*,
Appellants.

JUDGMENT — TIME OF ENTRY — CITY WARRANTS — DEFENSES AGAINST
ASSIGNEE — VACATING JUDGMENT.

The entry of a judgment some six months after its rendition does not render it void under the constitutional provision requiring a decision by the superior court within ninety days after the

Mar. 1898.] Opinion of the Court—REAVIS, J.

final submission of any cause to it, when the decision of the court was in fact given orally at the close of the trial.

Any defense that may be set up by a city against the original payee of its warrants is good as against his assignee.

Where all questions concerning the validity of certain city warrants have been tried and determined in an action against the original payee of the warrants, an action by his assignee to vacate the judgment, more than four years after the entry of judgment in the original action, is not seasonably made.

Appeal from Superior Court, Thurston County.—Hon. CHARLES H. AYER, Judge. Reversed.

P. M. Troy, and *A. J. Falknor*, for appellants.

Frank D. Nash, and *O. V. Linn*, for respondent.

The opinion of the court was delivered by

REAVIS, J.—This action was commenced in the superior court of Thurston county August 20, 1896, to vacate a portion of the decree rendered by the same court in the case of *W. J. Casebeer*, plaintiff, *v. I. Liberman* and the City of Olympia, defendants. The original cause was tried July 3, 1891, and the court at that date rendered its decision; the final order or decree therein was signed on July 8, 1891, and filed with the clerk January 23, 1892. The complaint states a cause of action in favor of *I. Liberman* upon a contract for grading and improving a street in the city of Olympia; that *Liberman* under said contract performed work and labor and that for such services there were issued and delivered to him in payment certain warrants drawn on a street grade fund, which warrants were transferred by *Liberman* to *Thomas & Co.*, and by them to plaintiff; the demand by plaintiff for payment of the warrants and refusal by the city treasurer to pay the same. The complaint also states that about June 8, 1891, *W. J. Casebeer* commenced the action heretofore mentioned, in the same court, against the city of Olympia and said *Liberman* in which he

prayed that the city of Olympia and its officers be restrained from executing or delivering to Liberman any warrant or other evidence of indebtedness or paying him any money for labor performed in grading and improving said street and from exercising any acts under his contract; that upon the commencement of such suit a temporary injunction was issued by the court and afterwards dissolved; that on the third of July, 1891, the action was tried and on January 23, 1892, the findings of facts and conclusions of law were filed; that a portion of the conclusions of law was:

“That said plaintiff was and is entitled to a restraining order and injunction of this court restraining the defendant the city of Olympia from issuing to defendant I. Liberman any warrant or other evidence of indebtedness for any work done by him under or pursuant to the alleged contract aforesaid, and from paying to him or to any one for him or upon any warrant or other evidence of indebtedness which may have been issued, any sums of money whatever; and it is therefore ordered and adjudged that the defendant the city of Olympia its agents and officers each and all are perpetually restrained and enjoined from issuing or delivering to defendant Liberman any warrant or other evidence of indebtedness or from paying to him or to any one for him any sum of money whatever by reason of any work done upon Franklin St. by defendant I. Liberman as aforesaid; and defendant I. Liberman is restrained and enjoined from exercising any and all rights under and by virtue of the alleged contract aforesaid.”

And it also alleges that no other or further order or judgment was made or entered in the action. It is also alleged that the warrants in question were issued before the trial of the suit of *Casebeer v. Olympia and Liberman*, and that the warrants were transferred by Liberman to Thomas & Co. prior to the filing of the findings of fact and conclusions of law. It is also alleged that the labor performed by Liberman in improving Franklin street was fairly and reason-

ably worth the amount represented by the warrants and that the city of Olympia has used and enjoyed the benefits of the work performed by Liberman on the improvements. Plaintiff also alleges that in the year 1891 the city of Olympia caused an assessment to be made on all the lots and parts of lots fronting upon Franklin street for the whole cost of making the improvements, including the value of the work performed by defendant Liberman, and that the city is proceeding to collect from the proper owners the total cost of the improvements, including the work performed by Liberman under his part of the contract as represented by the warrants in question, and that some portion of the assessment has been paid, and that the amount paid was sufficient to pay the warrants issued to Liberman, and also that the city treasurer paid other warrants since the injunction was issued. The contract between the city of Olympia and Liberman is also set out, in which, among other things, are found the following stipulations:

“ Said Liberman agrees that in consideration of the issuing of said warrants as herein provided he will waive the right to demand and receive payment from the city of Olympia in any other way.

“ It is further agreed that in case said Liberman shall fail to complete said work within the time herein named then the party of the first part shall have the right to consider said contract at an end and all rights and claims thereunder forfeited by said Liberman, nor shall said Liberman receive or be allowed any compensation for work done by him under this contract.”

The defendants, the city of Olympia and treasurer, demurred to the complaint, assigning seven grounds for demurrer, only two of which are deemed material here, the sixth one, that the complaint did not state facts sufficient to constitute a cause of action, and the seventh, that the action has not been commenced within the time limited by

law. The demurrer was overruled. The defendants then answered, and, after a number of denials, set up for an affirmative defense that two bids were made upon the contract mentioned in the complaint, one by Liberman and another by Casebeer and that Casebeer's was the lower bid, but that the officers of the city of Olympia unlawfully, after the sealed bids were opened and submitted to them by the two bidders, and in collusion with Liberman, changed his bid to make it lower, and without giving any further notice awarded the contract agreed on in improving Franklin street to Liberman, and that under such collusive contract a portion of the work was done by Liberman and the warrants in question issued to Liberman in payment therefor. Defendants then set up the judgment in the original action, which was sought to be vacated by the plaintiff, and that in the original action the court adjudged that the contract of Liberman was illegal and void and a perpetual injunction was issued against the payment of the warrants in question or any payment for any services performed by Liberman; that such suit was instituted by Casebeer as taxpayer of the city of Olympia. Plaintiff demurred to the affirmative defenses set up in the answer of defendants, and the superior court sustained such demurrer. The case was then tried in the superior court. That court found upon the issues tendered in the complaint in favor of the plaintiff and vacated the judgment in the case of Casebeer, a taxpayer, *v. City of Olympia and Liberman*, entered January 23, 1892. The superior court, among other findings of fact, found that the legality of the contract between Liberman and the city of Olympia to grade Franklin street was placed in issue in the case of Casebeer *v. Liberman and the City of Olympia*, in which the judgment is sought to be vacated by plaintiff, and that the court in that action found the contract to be illegally made and against public policy

Mar. 1893.] Opinion of the Court—REAVIS, J.

and void and of no force and effect, and that no appeal was ever taken from said original judgment by Liberman and no proceedings had ever been instituted in said superior court to modify or vacate the final order or decree entered in the original case. Such findings are not excepted to by plaintiff.

Plaintiff maintains that the findings of fact and conclusions of law and decree were not filed within ninety days after the trial and submission of the cause to the superior court and that, under the constitutional provision requiring a decision by the superior court within ninety days after the final submission of any cause to it, any judgment thereafter rendered was void. But this contention cannot be sustained, and in the judgment sought to be vacated here the decision appears to have been given orally by the court and could thereafter have been entered at any time. Some question is made by plaintiff upon the irregularity of the entry of the findings of fact and conclusions of law and the failure of the superior judge to distinctly label the decree; but these were mere irregularities, and from the record the judgment of the superior court substantially appears. From the allegations of the complaint and the findings of the superior court it fully appears that all the questions in litigation here were tried and determined by the same superior court in 1891 and that the conclusions and judgment of the court have been of record since January, 1892. During all that time the holder of the warrants in question has taken no action under the code of procedure to vacate or set aside the judgment. It has so frequently been ruled by this court that city warrants, such as those in question here, are not within the principles controlling the transfer of negotiable paper that it is merely proper to state that the plaintiff has no better rights in this suit than the original payee of the warrants, Liberman; and his rights were all completely

adjudicated, as we have seen, by the judgment sought to be vacated in this suit. In the case of *Long v. Eisenbeis*, 18 Wash. 423 (51 Pac. 1061), it was said:

"No reason is alleged by plaintiffs why application to vacate the judgment in the original action was not seasonably made. It will be found, upon an examination of the authorities, that, where such applications to vacate a judgment have been entertained, it has been in those cases where the complainants were without fault or negligence."

The judgment of the superior court is reversed with direction to enter judgment in this cause for the defendants.

SCOTT, C. J., and ANDERS and DUNBAR, JJ., concur.

GORDON, J., took no part in the decision of this cause.

[No. 2795. Decided March 26, 1898.]

19 156
37 639

SIMON S. WALDO, *Respondent*, v. WALTER J. MILROY,
Appellant, ABRAM M. HYATT *et al.*, *Respondents*.

ANCILLARY ADMINISTRATION — NECESSITY FOR — ACTION ON NOTE BY
ASSIGNEE — EVIDENCE — PLEADING.

The assignee of a foreign administrator may maintain an action in the courts of this state, although no administration has been had in this state upon that portion of the decedent's estate situated here.

In an action in the courts of this state by an assignee of a promissory note and mortgage, which had been assigned to him by a foreign administrator, the record of the foreign court showing the appointment of plaintiff's assignor as administrator is admissible in evidence.

The objection that the complaint in an action by the assignee of a foreign administrator does not sufficiently plead the proceedings had in the probate court of another state should be urged in form of a motion to make the complaint more definite, and not by demurrer.

Mar. 1898.] Opinion of the Court—GORDON, J.

Appeal from Superior Court, Yakima County.—Hon. JOHN B. DAVIDSON, Judge. Affirmed.

R. B. Milroy, and Frank H. Rudkin, for appellant:

Whether an assignee of a foreign administrator can maintain suit on a chose in action in this state, where the assignment is absolute, is a much disputed question. That he cannot, see *Dial v. Gary*, 37 Am. Rep. 737; *Pond v. Makepeace*, 2 Metc. (Mass.) 114; *Stearns v. Burnham*, 17 Am. Dec. 228; 1 Jones, Mortgages, § 797.

O. G. Ellis, and Bogle & Bigg, for respondents:

The overwhelming weight of authority conclusively establishes the right of the assignee of a chose in action from a foreign executor or administrator to maintain an action thereon in his name in the courts of the state where the debtor resides. *Petersen v. Chemical Bank*, 32 N. Y. 21 (88 Am. Dec. 298); *Smith v. Tiffany*, 16 Hun, 552; *Wilkins v. Ellett*, 108 U. S. (27 Law. ed.) 256; *Harper v. Butler*, 2 Pet. (7 Law. ed.) 239; *Mackay v. St. Mary's Church*, 2 Am. St. Rep. 881; *Riddick v. Moore*, 65 N. C. 382; *Rand v. Hubbard*, 4 Metc. (Mass.) 258; *Leake v. Gilchrist*, 2 Dev. 73; *Smith v. Railway Co.*, 23 Wis. 267.

The opinion of the court was delivered by

GORDON, J.—This action was originally commenced in the name of Lydia Waldo for the foreclosure of a real estate mortgage executed by the appellant Milroy. The respondents First National Bank, Richard Strobach, Nettie Strobach, E. A. Warriner, A. M. Hyatt and O. W. Bright were made parties defendant under the allegation that they had, or claimed, an interest in the premises subsequent to the mortgage lien. The plaintiff in the action as originally

commenced was a resident of the state of Connecticut. Subsequent to the commencement of the action, upon suggestion of the death of plaintiff, Simon S. Waldo, respondent, was on notice permitted to file an amended complaint, and to prosecute the action in his own name as owner of the note and mortgage. The amended complaint alleges the death of Lydia Waldo, the appointment of one John Waldo as her administrator by a Connecticut court and the assignment of the note and mortgage in suit by such administrator to the respondent. The appellant moved the court to strike the amended complaint, for the reason that it "substitutes a new and different cause of action from that set out in the original complaint." This motion was denied; thereupon the appellant demurred to the complaint upon two grounds; first, that the plaintiff has no legal capacity to sue, and second, that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the appellant answered denying upon information and belief all of the allegations of the complaint excepting that one in which it was alleged that he was an unmarried man. Upon these issues the cause proceeded to trial as between the parties to the controversy in this court, and resulted in a decree in respondent's favor, from which decree this appeal was taken. The first contention of the appellant is that the court erred in denying his motion to strike the amended complaint. We think that contention and the second one, viz., that the court erred in overruling the demurrer to the complaint, may be considered together—they raise substantially the same question. It is appellant's contention that the action abated by the death of Lydia Waldo (the original plaintiff) and that inasmuch as no administrator was appointed by any competent court of this state the assignee of a foreign administrator cannot maintain an ac-

tion. We have in the recent case of *Munson v. Exchange National Bank*, decided March 21, 1898, *ante*, p. 125, determined this question adversely to appellant's contention, and upon the authority of that case conclude that the court did not err in denying the motion to strike and overruling the demurrer to the complaint. The lower court also denied appellant's application for leave to file an amended answer, setting up that if an administrator of the estate of Lydia Waldo had ever been appointed it was by some court without the state of Washington. This was but another form of raising the same contention already passed upon, and the court did not err in refusing leave to amend. We do not think that it was error on the part of the court to receive the record of the Connecticut court showing appointment of respondent's assignor as administrator. The contention of appellant that the complaint did not sufficiently plead the proceedings had in the probate court in Connecticut, if tenable, should have been urged in form of a motion to make the complaint more definite.

No reversible error appearing the judgment is affirmed.

ANDERS, DUNBAR and REAVIS, JJ., concur.

[No. 2738. Decided March 28, 1898.]

W. D. GIBSON, *Respondent*, v. A. S. KERRY, *Appellant*.

LIMITATIONS — PARTIAL PAYMENT — BURDEN OF PROOF.

Where the bar of the statute of limitations has been pleaded against an action on account, the burden of relieving the account of the bar by proof of partial payment within the period of limitation, is upon the plaintiff, and, in case of denial of part payment by defendant, can be established only by clear and convincing testimony.

Appeal from Superior Court, King County.—Hon. ORANGE JACOBS, Judge. Reversed.

Allen & Allen, and *J. H. Powell*, for appellant.

Tremper & Winstock, for respondent.

The opinion of the court was delivered by

REAVIS, J.—Action brought by plaintiff to recover balance on an account for general merchandise sold to defendant and moneys paid and advanced for defendant's use. The complaint alleges that between April 6, 1893, and July 10, 1893, the various items constituting the account were furnished defendant, and that a number of payments were made on this account in lumber, shingles and lathes on the 1st of June, 1893, and that on April 29, 1895, a cash payment of \$18 was made on the account by defendant. The answer was a general denial of the material allegations of the complaint and for defense a plea of the statute of limitations. The action was brought March 23, 1897. Payments made by the defendant upon the account stated by plaintiff June 1, 1893, are admitted, but the payment of April 29, 1895, was in issue at the trial. Unless this last item of \$18 was a part payment upon the account the bar of the statute had attached before the commencement of the suit. The defendant testified positively that he never made any payment on the account and that the \$18 paid to plaintiff on the 29th of April, 1895, was paid for hay sold and delivered to him in 1895. On his examination in chief plaintiff testified relative to the \$18 payment:

“ Q.—What were the circumstances connected with the payment of this \$18; what was it for?

A.—Just about the time the camp was closed down, Kerry told me to get a bill of sale from Kerr, which I did, and as soon as I got it I transferred—sent it to Mr. Kerry, and among that was \$18 that was paid me for some hay on that bill of sale.

Mar. 1898.] Opinion of the Court—REAVIS, J.

Q.—This hay that was in the bill of sale, did that belong to you?

A.—No, sir; I just took the order according to Mr. Kerry's instructions, and got the bill of sale according to his instructions.

Q.—What account did you make of the \$18 you received?

A.—I gave Kerry credit on that account for it.

Q.—Did Mr. Kerry instruct you to apply it to any particular purpose, this eighteen dollars?

A.—No, sir, no particular purpose, never mentioned it; just paid it over to me, never mentioned about the account."

The plaintiff testified on his cross-examination as follows relative to the \$18 payment:

"Q.—Now, that \$18 that you claim was paid to you on April 27, was paid to you, I understand you to say, on a bill for hay, was it?

A.—On an order, yes, for hay.

Q.—For a bill of sale, was it not?

A.—Yes, sir.

Q.—Where did you get the hay?

A.—Bill of sale.

Q.—Where did you get the hay?

A.—From the bill of sale which was given, from Kerr.

Q.—You had received a bill of sale from Kerr to some hay?

A.—Yes, sir.

Q.—Anything else besides the hay?

A.—No, sir, I got the bill of sale for this.

Q.—Then you got the bill of sale for some hay and other stuff from Kerr?

A.—Yes, sir.

Q.—Where was this hay and other stuff you got the bill of sale for?

A.—At the camp."

This camp was one where Kerr & Co. were engaged in logging and plaintiff had furnished merchandise to this camp on defendant's account, but had ceased to furnish the same in July, 1893. The logging camp was being removed.

Plaintiff continued:

“ Q.—Now, does that hay appear on this bill?

A.—No, sir.

Q.—Nowhere?

A.—No, sir.

Q.—Do any of these items in that bill of sale appear on this bill?

A.—No, sir.

Q.—And the \$18 was paid as a part of the articles in that bill of sale, was it not?

A.—No, sir.

Q.—That is the hay?

A.—No, sir.

Q.—It was not paid for that hay?

A.—I didn't consider it so.

Q.—Didn't you testify a while ago that he paid you \$18 for the hay?

A.—He paid me \$18, that I never considered part of the hay.

Q.—Didn't he understand he was paying you for that hay?

A.—I don't know what he understood.

Q.—Was not he paying you for the hay in that bill of sale?

A.—I don't know. I presented the order and got my \$18.”

This order was made by the foreman of the logging camp who got the hay and was made upon the defendant.

“ Q.—You presented that order to Kerry, and he paid you \$18?

A.—Yes, sir.

Q.—And that was for the hay, was it not?

A.—I didn't—no, sir.

Q.—That order was for the hay?

A.—I don't know whether it was for the hay or not.

Q.—Was it goods that Marion got?

A.—Yes, sir; he got the goods.

Q.—Did Kerr get the goods for which you received that \$18?

Mar. 1898.] Opinion of the Court—REAVIS, J.

A.—Yes, sir, I considered it so.

Q.—If the order was for Marion on Kerry to pay you \$18 for hay that he had got, how did you consider it was hay that Kerry got?

A.—I got the order on Kerry, I got a bill of sale on Kerry's instructions, and I depended on him entirely.

Q.—That is, this was how you got this bill of sale?

A.—No, sir, it is not. I got him a bill of sale and itemized everything."

And again the question was asked plaintiff:

"Q.—Now, then, I will ask you again, for what was that \$18 paid you?

A.—Well, on the strength of that order he paid me it.

Q.—Now, did you sell that hay to Kerry?

A.—I never considered I sold it to Kerry, no, sir.

Q.—Who did you sell it to?

A.—I never sold it at all, I just presented the order as he told me to get it, which I did, and he gave me \$18 for it, and I applied it to his account.

Q.—*Who got the hay?*

A.—*Kerry got the hay.*

Q.—*Then who got the money for the hay?*

A.—*I did.*

Q.—That is the eighteen dollars?

A.—Yes, sir.

Q.—And you credited that on the account you sued for here?

A.—Yes, sir.

Q.—Who did you charge the hay to?

A.—Never charged anybody."

It has been noted that the account of plaintiff was more than three years old when the suit was commenced. The burden, then, of relieving the account against the bar of the statute pleaded was upon the plaintiff, and upon the fact of the payment made on the 29th of April, 1895, having been intended as a part payment on the account. The principle upon which part payment operates as a renewal of the account and a suspension of the statute is because a

promise to pay the balance of the debt is inferred from the partial payment and such payment is considered as an acknowledgment of the debt. Where the debtor makes part payment upon an account without any words of explanation the law infers that such payment is an acknowledgment of the remainder due, and a promise to pay it. In *Tippets v. Heane*, 1 Crompt. M. & R., 252, the rule is well stated:

“In order to take a case out of the statute of limitations by a part payment, it must appear, in the first place, that the payment was made on account of a debt. . . . Secondly, that the payment was made on account of the debt for which the action was brought, . . . and in the third place it is necessary to show that the payment was made as a part payment of a greater debt, because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at the time of part payment.”

While the jury in answer to the special interrogatory found that the \$18 was paid by defendant upon the account generally, it is not supported by substantial evidence. As we view the plaintiff's testimony, it is too evasive and contradictory to establish the fact of a part payment made on the account. It appears from the plaintiff's testimony that the defendant purchased some hay through, or from, the plaintiff, and that defendant paid plaintiff \$18 for the same, though this view is not certain; in fact, as already mentioned, the testimony upon this point by the plaintiff is involved and unsatisfactory, and not sufficient to justify the finding of the jury.

The judgment of the superior court is therefore reversed.

SCOTT, C. J., and DUNBAR, GORDON and ANDERS, JJ., concur.

[No. 2508. Decided March 29, 1898.]

WASHINGTON MILL COMPANY *et al.*, Respondents, v.
SPRAGUE LUMBER COMPANY, Respondent, FIRST NATIONAL BANK OF SPRAGUE, Appellant.

APPEAL — BRIEFS — CORPORATIONS — NOTE AND MORTGAGE BY STOCKHOLDERS — CONSIDERATION — RIGHTS OF CREDITORS — RECEIVERS.

Appellant's brief will be stricken from the files, when it fails to comply with the supreme court rule requiring references therein to the pages of the record for verification, except in cases where the record is not very extensive.

The giving of a joint and several note by one stockholder of a corporation as principal and by the other stockholders as sureties creates an individual liability against the makers, although they may have intended by its execution to create an obligation against the corporation.

The fact that the stockholders of a corporation are estopped to deny the validity of certain notes and mortgages as subsisting corporate obligations is not necessarily binding upon the creditors nor the receiver of the corporation.

A receiver of an insolvent corporation may, in behalf of creditors, disaffirm acts of the corporation and maintain actions to set aside transfers and conveyances of the corporate property made in fraud of their rights.

Where mortgages given by a corporation have been declared invalid at the suit of a receiver of the corporation, all *bona fide* creditors, prior as well as subsequent, are entitled to participate in whatever funds the receiver may procure as the proceeds of the property of the corporation.

Although corporations in this state have power under Gen. Stat., § 1500 (Bal. Code, § 4253), to mortgage real and personal property, such power must be confined within the purposes for which the corporation was created, and does not authorize corporations to mortgage their property to secure the debt of any, or all, of its stockholders, to the injury of its creditors.

When a corporation enters into a contract which under no circumstances it has power to make, such contract is void as to its creditors, although assented to by all of its stockholders, since the party attempting to contract with the corporation is chargeable with notice of its powers.

The securing by a corporation of a stockholder whose services will be valuable to it by reason of his being a practical machinist would not afford sufficient consideration for a mortgage of all the corporate property to secure the individual debt of such stockholder, even if it were conceded that the corporation had the power to execute a mortgage of such character.

Appeal from Superior Court, Lincoln County.—Hon. WALLACE MOUNT, Judge. Affirmed.

J. W. Merritt, for appellant.

Danson & Huneke, for respondents.

The opinion of the court was delivered by

ANDERS, J.—The respondents moved to strike the brief of appellant from the files on the ground that the pages of the record were not referred to therein for verification, as required by Rule VIII. of this court. But, as the record did not appear to be very extensive and the errors assigned were largely predicated upon the alleged fact that the trial court's conclusions of law were not supported by the findings as made, we, following *Froelich v. Morse*, 15 Wash. 636 (47 Pac. 22), denied the motion at the hearing, although appellant had not complied with the rule even substantially. We deem this rule eminently reasonable, as it is but a matter of simple justice to the court and opposite counsel to designate in the brief just where any fact or proposition discussed therein may be found in the record. A failure to comply with the requirements of the rule might, in certain instances, impose great and unnecessary labor upon this court; and we again take occasion to suggest that it is not only the better, but the safer, practice for counsel to observe the rule in all cases.

The respondents, Washington Mill Company and the Sprague Lumber Company, are corporations organized and existing under and by virtue of the laws of the state of

Washington. In September, 1892, all of the capital stock of the Lumber Company was owned by David B. Strickler, C. F. Bassett and F. H. Hayes, each holding the same number of shares. On or about the 29th day of that month the said Strickler sold his stock to one Nygard for the agreed price of \$5,000, receiving in payment therefor \$2,500 in cash and land, and a note for \$2,500, the remainder of the purchase price, signed by the said Nygard, Bassett and Hayes, the last two named individuals being sureties for Nygard. Before the note was executed, the president of the appellant, the First National Bank of Sprague (now Fidelity National Bank of Spokane) agreed with Strickler to discount the note, and, although he first suggested that the note be executed by the Lumber Company in its corporate name, he finally concluded to have it signed by the stockholders individually, "to avoid any irregularities of the corporation," which was accordingly done by his direction. Strickler then took the note and immediately delivered it to the bank in pursuance of the original agreement, the president and manager of the bank knowing at the time that it was given and received in part payment of a debt due from Nygard individually. The note was joint and several in form, and was due in one year after date. The makers not being able to pay it at maturity, on December 29, 1893, a new note was given to the bank payable on demand for the principal of the first note and accrued interest thereon. This note was also joint and several, and was signed by the same parties who executed the first one. On January 20, 1894, the Lumber Company, at the request of the bank, executed a mortgage upon all of its real estate, and a chattel mortgage upon all its personal property to secure the payment of the last mentioned note. At the time of the making of these mortgages it was agreed by and between the parties thereto that the mortgagor should retain possession of the

property mortgaged, conduct its business as usual, and out of the proceeds thereof pay the bank \$100 per month, provided the business of the company justified the payment of that sum. Payments to the bank were made on the note from time to time by the Lumber Company, and the amount thereof was charged to Nygard on the books of the concern. The Lumber Company conducted its business after the execution of the mortgages as it had theretofore done, until about January 6, 1896, at which time, being wholly insolvent, it ceased to do business and turned its property over to the bank. At the time the mortgages above mentioned were given, the Lumber Company owed various persons, but no provision whatever was made for the payment of these debts. In January, 1896, the respondent, Washington Mill Company, instituted this action against the Lumber Company to recover the balance due on an account for lumber and building materials sold and delivered to the defendant between May 29, 1893, and October 22, 1895, and to obtain a decree declaring the two mortgages given to the bank null and void. The plaintiff in its complaint alleged the insolvency of the defendant and asked that a receiver of its property be appointed. The Lumber Company not objecting, the respondent, Sanderson, was duly appointed such receiver. After giving the bond required by the court, the receiver, by leave of the court, filed his complaint in intervention alleging, in substance, that the defendant, Sprague Lumber Company, without any consideration, had executed and delivered to the First National Bank of Sprague, the other defendant, a mortgage upon all its real estate and another mortgage upon its personal property; that these mortgages were given to secure an indebtedness owing to said bank by a third person; that the Sprague Lumber Company had no authority under its articles of incorporation to become surety, and that, at the time

the mortgages were executed and delivered, the Sprague Lumber Company was indebted to various creditors, which indebtedness had not since been paid. Upon this complaint the receiver asked to have both mortgages declared void and canceled. The bank answered both plaintiff's and intervenor's complaints, setting up facts intended to show the validity of the mortgages. The court found the mortgages void as to the plaintiff and receiver, and entered its decree accordingly.

The claim that the court erred in finding that the note in question was signed by Bassett and Hayes as sureties for Nygard is, in our judgment, without any substantial foundation. Mr. Bassett himself testified explicitly that he and Mr. Hayes both signed the first note as sureties for Nygard; and the very nature of the transaction clearly shows that such was the fact. Nygard alone owed the debt for which the note was given, and if the other parties to the note were not his sureties it is difficult, to say the least, to understand what their relations to him were. The fact, if it be a fact, as claimed by appellant, that they did not intend to be bound individually when they signed the note, and that they supposed they were creating an obligation against the corporation, cannot change their status as shown by the note itself, as well as by the evidence with reference to it. The second note was but a renewal of the first, and the relations of the parties thereto to each other remained the same. The finding of the court that the note in controversy was executed on September 29, 1893, was erroneous, it in fact having been made on December 29, 1893. But this error was in nowise prejudicial to the appellant, as the respondents are not claiming that the lapse of time between the execution of the note and the mortgages constitutes any evidence of bad faith on the part of the makers or the Lumber Company or the bank. That the note deliv-

ered to the appellant bank evidenced a debt of the individual makers thereof, and not that of the corporation in which such makers were stockholders, seems to us almost too plain for argument or discussion. But the fact that Bassett and Hayes signed it as sureties for Nygard did not in any manner affect the bank. As to it, the note was manifestly the debt of each and every one of the makers. It would be no defense to a suit by the bank on this note for Bassett and Hayes, or either of them, to plead that they were merely sureties for Nygard. It is contended by the learned counsel for the appellant that inasmuch as the Lumber Company and all of its stockholders have at all times recognized the note and mortgage as valid and subsisting obligations against the corporation, neither the stockholders nor the corporation can now be heard to say that they are invalid and that the creditors of the corporation are in no better position in that regard than the stockholders themselves. But, assuming, for the present, that the validity of the mortgages cannot be called in question by the stockholders, all of whom authorized their execution, it by no means follows that they are good against creditors of the Lumber Company or their representative, the receiver. The receiver of an insolvent corporation represents not only the corporation, but also the stockholders and creditors, and it is his duty to assert and protect the rights of each of these several classes of persons. Wait, *Insolvent Corporations*, § 210; Boone, *Corporations*, 174. And as a representative of creditors the receiver is vested with rights not possessed by the corporation. Wait, *Fraudulent Conveyances*, § 117. In behalf of creditors he may disaffirm acts of the corporation, and maintain actions to set aside transfers and conveyances of the corporate property made in fraud of their rights. Wait, *Insolvent Corporations*, §§ 562, 227; *Van Cott v. Van Brunt*, 2 Abb. N. C. 283;

Upton v. Englehart, 3 Dill. 496; *Gillet v. Moody*, 3 N. Y. 479; *Talmage v. Pell*, 7 N. Y. 328; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Alexander v. Relfe*, 74 Mo. 495; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46 (23 N. E. 530). Discussing this question, the court in the case last cited well said:

“It is claimed that no action could have been maintained by the trustee, representing the trust combination, against the Brush Electric Light Company, to recover the purchase price of the carbons, for the reason that the illegality of the combination would have constituted a good defense. Assuming this predicate, it is asserted that the receiver stands in the same position, and that his title is subject to the same infirmity as that of the combination which he represents. Without considering the assumption upon which this proposition is based, it is a sufficient answer to the proposition asserted, that the receiver unites in himself the right of the trust combination, and also the right of creditors, and that he may assert a claim as the representative of creditors, which he might be unable to assert as a representative of the combination merely. The general rule is well established that a receiver takes the title of the corporation or individual whose receiver he is, and that any defense which would have been good against the former, may be asserted against the latter. But there is a recognized exception, which permits a receiver of an insolvent individual or corporation, in the interest of creditors, to disaffirm dealings of the debtor in fraud of their rights. (*Gillet v. Moody*, 3 N. Y. 479; *Porter v. Williams*, 9 id. 142; *Curtis v. Leavitt*, 15 id. 9, 108.) Assuming that the trustee could not have recovered of the Brush Electric Light Company for the reasons suggested, it would be a very strange application of the doctrine that no right of action can spring from an illegal transaction, which should deny to innocent creditors of the combination, or to the receiver who represents them, the right to have the debt collected and applied in satisfaction of their claim. The just rule of the common law, that courts will not lend their aid to enforce illegal transactions at the instance of a party to the illegality, would be

misapplied if permitted to be used to prevent the application of the fund in question to the payment of creditors of the combination.”

While it is perhaps unnecessary to add anything to what was there said by the learned court, it may be proper to observe that the application of the doctrine contended for by the appellant to this case would place the creditors of the Lumber Company completely at the mercy of the officers and stockholders of the corporation.

The next question to be considered is whether the mortgages under consideration are void as to the respondent Mill Company, or any of the creditors represented by the receiver. The appellant insists that their validity cannot be questioned by the Washington Mill Company for the reason that its claim accrued subsequently to the time of their execution, citing *Roy & Co. v. Scott, Hartley & Co.*, 11 Wash. 399 (39 Pac. 679), in support of its position. The evidence on that point is not clear, but we are inclined to the opinion that the most, if not all, of the Mill Company's debt did accrue after the mortgages were made, and that said company must therefore be held to be a subsequent creditor. But, assuming that to be true, it does not necessarily follow that the judgment must be reversed. The court below found, and the proof shows, that at the time the mortgages were executed there were various creditors of the Lumber Company whose claims have never been paid. These creditors were represented by the receiver, and if the mortgages were void as to them, or any of them, the court was right in setting them aside. Bump, *Fraudulent Conveyances* (4th ed.), § 34. And we are of the opinion that they were void as to existing creditors at least, and all *bona fide* creditors are therefore entitled to participate in whatever funds the receiver may procure as the proceeds of the property of the corporation. Wait, *Fraudulent Convey-*

ances (3d ed.), § 104. Bump, *Fraudulent Conveyances* (4th ed.), § 297. It is true that our statute in relation to corporations authorizes them to mortgage, sell and convey real and personal property (1 Hill's Code, § 1500, subd. 3, Bal. Code, § 4253), but that does not change the law as to the rights of creditors. Nor does that section authorize corporations to mortgage their property for all conceivable purposes and under all circumstances. A corporation, being the mere creature of the law, possesses only those powers which the statute, or its articles of incorporation, confer upon it, either expressly or as necessarily incidental to the purposes for which it was created. Green's *Brice's Ultra Vires*, 29; *Bank of Augusta v. Earle*, 13 Pet. 587; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Beach v. Fulton Bank*, 3 Wend. 583. Our statute also provides that corporations shall have power to carry on all kinds of business within the objects and purposes of the company, as expressed in the articles of incorporation. 1 Hill's Code, § 1500, subd. 7 (Bal. Code, § 4253). The articles of incorporation of the Sprague Lumber Company provided that the object and purposes of the company were "to manufacture, buy and sell lumber, and of engaging in the lumber business and selling all kinds of building material." And, as incident to the business therein specified, the company might have bought lumber on credit and properly mortgaged its property to secure the payment of such debt. But manifestly it had no power to mortgage all its property, without consideration, to secure the debt of any, or all, of its stockholders, to the injury of its creditors. It was no part of its business to become surety for the accommodation of others. Green's *Brice's Ultra Vires*, p. 252; *Lucas v. White Line Transfer Co.*, 59 Am. Rep. 449 (30 N. W. 771). See, also, *Madison, etc., Plank Road Co. v. Plank Road Co.*, 7 Wis. 59. And every person dealing with it

was charged with notice of its powers. When a corporation enters into a contract which under no circumstances it has power to make, such contract is void as to its creditors, although assented to by all of its stockholders. *National Trust Company v. Miller, supra*, and cases cited. See, also, *Webster v. Howe Machine Co.*, 54 Conn. 394 (8 Atl. 482). This principle was applied in *Stewart v. Gould*, 8 Wash. 367 (36 Pac. 277), where it was, in effect, held that one owning all of the stock of a corporation was not authorized to transfer the property of the corporation to secure an individual indebtedness, to the prejudice of the corporation creditors. But the appellant insists that the note and mortgage were not executed without consideration, for the reason that the Lumber Company was benefited by having the services of the stockholder Nygard, who was a practical machinist, and that under our decision in *Wheeler, Osgood & Co. v. Everett Land Co.*, 14 Wash. 630 (45 Pac. 316), the mortgages in question are valid. We held in that case that a corporation, under its articles of association, which were quite comprehensive and general, had a right to become surety for a contractor, in accordance with the local custom of such companies, for the purpose of procuring certain business, and which it did procure. There the corporation by becoming surety received a direct benefit in the enhancement of its ordinary and legitimate business, but no such fact appears in this case. The powers of the Lumber Company are much more circumscribed by its articles of incorporation than were those of the corporation there considered. And even if it were conceded, which we do not concede, that the Lumber Company had power to execute the mortgages under consideration, still it would be impossible to conclude that the practical ability and valuable services of a new stockholder were a sufficient consideration for a pledge of all the property of the company to

Mar. 1898.]

Argument of Counsel.

secure such stockholder's debt. The cases cited from other courts by appellant differ so widely from the case at bar in respect to the facts and circumstances involved that they are entitled to but little weight in support of its contention.

We have carefully examined all of the errors assigned by appellant, and, perceiving no substantial error in the record, the judgment is affirmed.

SCOTT, C. J., and GORDON, DUNBAR and REAVIS, JJ.,
concur.

[No. 2690. Decided March 29, 1898.]

PIERCE COUNTY, WASHINGTON, AND STEPHEN JUDSON,
as Treasurer, Respondents, v. E. C. MERRILL *et al.*,
Defendants, GEORGE L. ROSE, *Appellant*.

TAXATION — ACTION TO ENFORCE — WHEN ACCRUES — STATUTORY REMEDY.

The right of action for the collection of a tax does not accrue at the date the lien attaches, but from the date of delinquency.

An action will not lie for the collection of a tax on personal property, when the statute gives the treasurer the exclusive right to enforce the collection of the tax by distraint and sale of the property taxed

Courts of equity have no jurisdiction to collect taxes or to appoint a receiver for that purpose.

Appeal from Superior Court, Pierce County.—Hon.
THOMAS CARROLL, Judge. Reversed.

H. G. Rowland, and *John W. Blake*, for appellant:

Where the legislature has provided a remedy for the collection of taxes on personal property, such remedy is exclusive, and no other means can be resorted to to coerce pay-

ment. *Richards v. County Commissioners*, 40 Neb. 45 (42 Am. St. Rep. 650); *People v. Biggins*, 96 Ill. 481; *Mason County v. Simpson*, 13 Wash. 250; Cooley, Taxation (2d ed.), 16. The remedy for the collection of taxes on personal property in this state is by distraint after the 1st day of December following the date of such delinquency, and no action for the collection of a tax on personal property can be maintained, unless especially given by statute. *State v. Baltimore & O. R. R. Co.*, 23 S. E. 677; *Andover Turnpike v. Gould*, 6 Mass. 40 (4 Am. Dec. 80); *City of Camden v. Allen*, 26 N. J. Law, 398; *Board of Commissioners v. First National Bank*, 30 Pac. 22; *City of Detroit v. Jepp*, 18 N. W. 217; *Richards v. Stogsdel*, 21 Ind. 74; *State v. Southwestern R. R. Co.*, 70 Ga. 11; *Montezuma V. W. S. Co. v. Bell*, 36 Pac. 1102.

A. R. Titlow, Prosecuting Attorney, for respondents:

A tax lien on personal property may be enforced by suit and is not confined to the statutory remedy. *City of Oakland v. Whipple*, 39 Cal. 112; *People v. Seymour*, 16 Cal. 332 (76 Am. Dec. 521); *City of Dubuque v. Illinois Central R. R. Co.*, 39 Iowa, 56; *Davenport v. Chicago, R. I. & P. R. R. Co.*, 38 Iowa, 633; *City of Burlington v. Burlington & M. R. Co.*, 41 Iowa, 134.

The opinion of the court was delivered by

REAVIS, J.—Suit in equity by respondents to restrain removal from the county of Pierce of certain personal property on which the county claimed a lien for taxes for the year 1896. Taxes for the years 1893, 1894 and 1895 are also due, for which taxes the county had a lien. The defendants were non-residents of the state and the defendant Rose was about to remove from the state goods on which the county claimed a lien for the taxes of the year 1896, be-

fore the same became due. The court enjoined the removal of the goods and appointed a keeper or receiver to take charge of the same pending litigation or the further order of the court. After the appointment of the receiver the defendant Rose paid the county treasurer the principal for the taxes of the year 1896, but no costs of the action. Respondents dismissed their claim for the taxes for the years 1893, 1894 and 1895. The court ordered sufficient of the property sold to pay the costs incurred and entered judgment accordingly, adjudging costs against defendant, which judgment was carried into effect by the sale of sufficient of the goods to pay the costs. From this judgment and decree defendant Rose appeals. The defendant Rose, on his first appearance in court, filed a demurrer to the complaint assigning that it appeared upon the face of the complaint that the court had no jurisdiction of the person of the defendant or the cause of action and that the complaint does not state facts sufficient to constitute a cause of action against the defendant Rose. The demurrer was overruled and Rose filed his answer. Upon the trial the findings of fact filed in the superior court which are material to the consideration of the cause here were that the defendant Rose was during the entire year of 1896 the owner of personal property situated in Pierce county and that the board of county commissioners duly levied a tax upon all the assessed value of property within the county and that the taxes were duly assessed and carried on the assessment rolls; there was assessed against defendant for taxes in the year 1896 the sum of \$18; that at the time of the commencement of the action defendant Rose was about to remove the goods on which the taxes were levied from their then location and take them out of the state, and that the defendant Rose was a non-resident of the state; that after the commencement of the action defendant Rose paid

the taxes for the year 1896, amounting to \$18, but refused to pay the costs of the action. No exceptions were taken to the findings of fact. The suit was commenced on the first day of March, 1897. Taxes for the year 1896 did not become delinquent until the thirty-first of May, 1897. They became a lien on the personal property on the first day of January, 1897. Laws 1895, p. 513, § 14; p. 520, § 21. The right to demand payment and to enforce the collection of taxes accrued after the first day of December, 1897. Laws 1895, p. 514, § 15. The language of the statute (§ 14) is:

“All taxes made payable by the provisions of this act shall be due and payable to the treasurer as aforesaid, on or before the thirty-first day of May in each year.”

In *Seattle v. O'Connell*, 16 Wash. 625 (48 Pac. 412), it was held by this court, quoting Wood on Limitations, § 164, that

“Where an assessment or tax is laid, and, by ordinance or statute, a certain time is fixed within which it may be paid, the person against whom it is laid has the whole of such period within which to pay it.”

Hence the right of action does not accrue at the date the lien attaches, but from the date of delinquency. The act of the legislature before mentioned pointed out the method for the collection of taxes on personal property. It gives the treasurer the exclusive right to enforce the collection of personal property tax by distraint and sale of the property taxed. It seems to be the general rule that an action will not lie for the collection of a tax on personal property unless expressly given by statute. It also seems to be the rule that courts of equity have no jurisdiction to collect taxes or to appoint a receiver for that purpose. *Thompson v. Allen County*, 115 U. S. 550 (6 Sup. Ct. 140); *High, Receivers* (2d ed.), § 408 a; *People v. Biggins*, 96 Ill. 481; *Board of Com'rs v. First National Bank*, 48 Kan. 561

Mar. 1898.]

Argument of Counsel.

(30 Pac. 22). Under the act in question no personal judgment could be rendered for the collection of the tax. 25 Am. & Eng. Enc. Law (1st ed.), p. 317. We do not think the complaint states facts sufficient to constitute a cause of action.

The judgment of the superior court is reversed for further proceedings in conformity to this opinion.

ANDERS and GORDON, JJ., concur.

DUNBAR, J., dissents.

[No. 2815. Decided March 29, 1898.]

E. V. WRIGHT, *Respondent*, v. LOUISE M. STEWART,
Appellant.

EVIDENCE — ADMISSIONS OF AGENT — BURDEN OF PROOF — PAROL
EVIDENCE.

The admissions of one who was acting as agent for defendant throughout certain transactions as to the indebtedness of defendant to plaintiff's assignor growing out of such transactions, are admissible in evidence.

The burden of proof rests upon that party, either plaintiff or defendant, who holds the affirmative of any proposition necessary to be established.

Parol testimony is admissible for the purpose of proving the real consideration of a contract which recites that it is given for one dollar and "other considerations," if such testimony is not for the purpose of contradicting the written instrument or of defeating the operative effect of it, but merely in explanation of how the contract came to be made, and the consideration for it.

Appeal from Superior Court, Pierce County.—Hon.
THOMAS CARROLL, Judge. Affirmed.

T. W. Hammond, for appellant:

To render the declarations of an agent admissible not only must the agency be established, but it must be shown

19	179
23	613
19	179
27	29
19	179
35	474

that they were made by the agent while actually engaged in the transaction to which they relate, or so soon after as to really form a part of it. If made after the occurrence of the transaction, or while the agent was not engaged in it, or after his authority in the matter had ceased, such declarations are never admissible against the principal. *Mutter v. I. X. L. Lime Co.*, 42 Pac. 1069; *Commercial Fire Ins. Co. v. Morris*, 18 South. 36; *Presley v. Lowry*, 25 Minn. 115; *Woods v. Clark*, 24 Pick. 39; *Packet Co. v. Clough*, 20 Wall. (22 Law. ed.) 541; *Mechem, Agency*, § 714; 1 *Evans, Agency*, 214.

Frederick A. Brown, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—Respondent sues the appellant in this action, as holder of four claims against appellant assigned to her by J. W. Wright and F. X. Cline. The claims of Wright and Cline arise out of the same transaction, and may be treated as one. The Western Blank Book Company, a corporation, executed to Wright its note for \$469.97, and various other notes to other persons. Paragraphs four and five of the complaint are as follows:

“That on the 19th day of October, 1894, said Western Blank Book Company agreed with said J. W. Wright and the other owners of said promissory notes that if they and each of them would endorse the same and deliver the same to the defendant Louise M. Stewart that they would execute and deliver to said Louise M. Stewart a certain chattel mortgage upon all their property of every kind and description, to secure the payment of said notes; that in pursuance to said agreement said J. W. Wright and the other owners of said promissory notes endorsed the same and delivered the same to Louise M. Stewart, and said Western Blank Book Company executed and delivered to said Louise M. Stewart said chattel mortgage upon all of its property of every kind and description to secure the pay-

Mar. 1898.] Opinion of the Court — DUNBAR, J.

ment of said promissory notes, and said Louise M. Stewart then and there accepted said promissory notes, so endorsed and delivered to her and said chattel mortgage securing the same, and then and there agreed with said J. W. Wright and the other owners of said notes to hold said chattel mortgage and said notes in trust for said J. W. Wright, and the other owners of the same, for the respective amounts due each on said notes.

“That thereafter on or about the 16th day of February, 1895, said J. W. Wright assigned his interest in said chattel mortgage to defendant, and released to defendant said mortgage property from any and all claim he had or might have against the same by reason of said chattel mortgage and released defendant from all liability to him as trustee of said mortgage, and defendant in consideration thereof agreed then and there to pay J. W. Wright within a reasonable time therefrom the amount of said promissory note, to-wit, the sum of \$469.97 and interest thereon from the 19th day of October, 1894, at the rate of ten per cent. per annum, and then and there became personally liable to said J. W. Wright to pay him said sum of \$469.97 and interest thereon from the 19th day of October, 1894, at the rate of 10 per cent. per annum.”

For a second cause of action it is alleged that said Wright worked for defendant, and that there is a balance due for said work of \$215, and that the claims were assigned to the plaintiff. The appellant in her answer admits all of the allegations in paragraph four above referred to, and alleges: that on February 16, 1895, said J. W. Wright executed and delivered to defendant for a valuable consideration a written instrument, whereby he granted and released and quit-claimed unto defendant all his right, title and interest of the chattel mortgage mentioned in paragraph four of the complaint, and the personal property therein described, and released her from all liability to him as trustee of said mortgage, and alleges that for the same consideration said J. W. Wright, by said instrument, re-

linquished and released to her any and all claim that he might have against the defendant by reason of the note executed and delivered to him by said corporation as aforesaid; but denies that she ever agreed to pay him \$469.97, or any other sum, and denies the second cause of action *in toto*. It was the contention of the appellant upon the trial that the understanding was when Wright released his liability on the note and mortgage, that he was to have the value of the same in stock in a company which the appellant intended to organize at some future time. Upon the trial of the cause, verdict was rendered for respondent for the amount asked in the complaint. There were a great many other issues involved in this cause, but these are sufficient for the discussion of the errors alleged.

The first assignment is, that the court erred in allowing one Wood to testify to a conversation with the son of appellant, Charles Billings, in which it was asserted by the son that there was something due from appellant to respondent in this action, and it is contended by appellant that the statement could not bind the appellant; and as a general proposition, of course, this is true, and needs no citation of authorities; but we think, in the first place, that the record fairly shows that Billings was the agent of the appellant throughout this whole transaction. In addition to that it is plain from the record that this testimony was simply cumulative, and the same witness testified in the same connection that he had also had a conversation with Mrs. Stewart, appellant, in which she told him the same thing that he alleges was told him by Billings. In reply to this, the appellant insists it is not at all impossible that the jury may have believed appellant and disbelieved her son. But the main fact having been denied both by appellant and her son, the question would be whether or not the jury believed the statement of the witness Wood, and if

Mar. 1898.] Opinion of the Court — DUNBAR, J.

they believed appellant it would certainly impeach the veracity of the witness. We feel convinced that the admission of this testimony, if error at all under the circumstances of this case, was clearly error without prejudice.

The following instructions are assigned as error:

"It is admitted by the defendant that Wright and Cline assigned their interest in the note and mortgage to defendant; and the burden is upon her to establish by a fair preponderance of the evidence, the purpose of such transfer, if she was not to pay anything therefor other than the one dollar in the paper."

The court had already instructed the jury that the burden is always upon the parties holding the affirmative, and that the burden in the first instance was upon plaintiff, and that the plaintiff must establish, by a fair preponderance of evidence, that the defendant agreed to pay said Wright and Cline a greater sum than the one dollar named in the paper transferring the note and mortgage to her. We think this instruction correctly stated the law. The burden, as the court stated, is upon the plaintiff to establish the agreement to pay a sum greater than the one dollar named in the paper; but it having been admitted, and it was admitted by the defendant, that Wright and Cline had assigned their interest in the note and mortgage to her, and the testimony in the case showing according to appellant's theory that the consideration which they were to receive for assigning a valuable right to the appellant, and releasing their interest in the same for her benefit, was a consideration other than that expressed in the paper; namely, the acceptance of shares of stock in another corporation, the burden is certainly upon the party who has the affirmative of this proposition.

Respondent's third contention is, that the court erred in allowing parol evidence to show what the consideration was for the execution of the quit-claim to appellant of the

assigned claims. The contention is that the entire agreement of the parties is merged in the writings shown to have been executed. We do not think the cases cited by the appellant to sustain this contention are in point. Of course, if the testimony was for the purpose of contradicting the written instrument or to defeat the operative effect of it, in the absence of fraud, or mistake, it would not be admissible, but the testimony offered here had no tendency to dispute or contradict anything that was alleged in the contract or to defeat its operation. It is simply an explanation of how the contract came to be made and the consideration for the same. The contract itself says, that the said parties of the first part in consideration of one dollar, and of other considerations, hereby grant, etc.; what the other considerations were is not expressed in the contract, and it is no contradiction of it in any sense to prove what the considerations were. We have carefully examined not only the briefs but the record in this cause, and we are satisfied that no reversible error was committed by the court, and the jury having decided the questions of fact against the appellant, she will have to abide by the verdict.

The judgment will be affirmed.

SCOTT, C. J., and ANDERS and REAVIS, JJ., concur.

Mar. 1898.] Opinion of the Court—GORDON, J.

[No. 2882. Decided March 29, 1898.]

FRED G. PICKERING, *Appellant*, v. OSCAR BALL, *as
Treasurer of Skagit County, Washington, Appellant.*

19	185
190	520

TAXES LEVIED UNDER UNCONSTITUTIONAL LAWS—VALIDITY—DELIN-
QUENCY CERTIFICATES—INCLUSION OF PENALTIES.

Dike and ditch taxes levied subsequent to the adoption of the state constitution by districts organized prior thereto are illegal and void, when the dike and drainage laws are in conflict with provisions of the constitution, since the effect of the adoption of the constitution was to abrogate and annul all territorial laws repugnant to it.

Under Laws 1897, p. 181, § 94 (Bal. Code, § 1749), providing for the issuance of delinquency certificates upon payment of taxes and interest against delinquent property, the treasurer is authorized to include as a portion of the payment necessary to secure the delinquency certificate such penalties authorized by prior laws as have attached and become a part of the taxes.

Appeal from Superior Court, Skagit County.—Hon. J. P. HOUSER, Judge. Affirmed.

E. C. Million, for plaintiff.

I. E. Schrauger, Prosecuting Attorney, (*E. P. Barker*, of counsel), for defendant.

The opinion of the court was delivered by

GORDON, J.—This cause was submitted to the lower court upon an agreed statement of facts, and from its judgment both parties have appealed. The statement shows that the plaintiff is the owner of forty acres of land lying in Skagit county, upon which for the years 1891, 1893 and 1894, there was levied a tax known as a dike tax for the purpose of paying the indebtedness of dike district No. 2, in which district said land was located; also, that the land lies within the limits of a ditch district organized under the

ditch law of the state of Washington for 1889-90, and that during the years 1893 and 1894 there was levied upon said land a ditch tax; that all of said taxes appear upon the tax rolls in the office of the defendant, who is the treasurer of Skagit county; that a portion of said land was also duly assessed for the years 1894, 1895 and 1896, and taxes levied thereon for general, state, county and school district purposes; that prior to the commencement of this action the plaintiff tendered to the defendant, as treasurer, the full amount of general, state, county, school and road district taxes levied upon the land, but plaintiff refused to pay any amount standing upon the tax rolls as dike or ditch taxes; that the defendant refused to issue the certificate of delinquency unless the plaintiff should pay the dike and ditch taxes hereinbefore referred to, and a penalty of two per cent. upon the taxes levied for general, state, county, school and road purposes for the years 1894 and 1895. In substance the lower court held that plaintiff was entitled to a certificate of delinquency without paying the dike and ditch taxes, but that he should pay upon the general taxes levied for 1894 and 1895 a penalty of two per cent., as provided by § 14 of Laws 1895, p. 513. From so much of the judgment as held the defendant not entitled to collect the dike and ditch taxes the defendant as treasurer has appealed, and from that part of the judgment which required the plaintiff to pay the penalty of two per cent. upon the amount of general taxes levied against his land before receiving a certificate of delinquency the plaintiff has appealed.

The dike law of 1888 and the ditch or drainage law of 1889-90 have both been held unconstitutional, the former under the decision of this court in *Snohomish County v. Hayward*, 11 Wash. 429 (39 Pac. 652), and the latter in *Skagit County v. Stiles*, 10 Wash. 389 (39 Pac. 116). But

Mar. 1898.] Opinion of the Court — GORDON, J.

defendant urges that inasmuch as diking district No. 2 was organized prior to the adoption of the constitution the tax thereafter levied by the proper officers was a legal tax, the basis of the contention being that the territorial law was not repugnant to the organic act of the territory, that the district was at the time of its creation legally organized, and that districts so organized do not come within the rule laid down in the cases of *Snohomish County v. Hayward*, and *Skagit County v. Stiles*, *supra*. This contention cannot prevail. The taxes were not levied until long after the adoption of the constitution of the state. The effect of the adoption of the constitution was to abrogate and annul all territorial laws repugnant to or in conflict with any of its provisions. For that purpose it was as effectual as an express repeal of those laws, and it follows that the law was not in force when these taxes were levied, and the superior court was right in so deciding. We think also that court was right in holding that the plaintiff was not entitled to a certificate of delinquency without paying the two per cent. penalty attaching under the law of 1895, *supra*, to the taxes levied upon his property for the years 1894 and 1895. Plaintiff relies upon the language of § 94, p. 181, Laws 1897 (Bal. Code, § 1749), which makes it the duty of the treasurer "upon demand and payment of the *taxes and interest* to make out and issue certificates of delinquency against such delinquent property," his contention being that had the legislature intended that the penalty should be collected in addition to the taxes and interest the word "penalty" would have been used. We find nothing in the act to justify the assumption that the legislature intended to remit the penalty which had theretofore attached to delinquent taxes, excepting only as is contained in the proviso to § 118, Laws 1897, p. 192 (Bal. Code, § 1771). That section (118) provides that all costs, pen-

alties and interest in excess of six per cent. per annum from the date of delinquency upon taxes levied for the year 1895 and previous years should be remitted, provided,

“That in order to receive the benefit of the remission herein provided for, all such delinquent taxes shall be paid on or before the 30th day of November, 1897, with interest as aforesaid, and if not so paid, then all the penalties, costs and interest, now charged against the same shall be and remain a charge against such delinquent property.”

We think the claim of defendant is fully answered by the plain language of the statute, which leaves no room for construction. This penalty had attached and become a part of the taxes prior to plaintiff's tender, which was not made until after the 30th day of November, 1897.

The judgment of the superior court will be in all things affirmed, and neither party will recover costs in this court.

SCOTT, C. J., and ANDERS, DUNBAR and REAVIS, JJ.,
concur.

[No. 2757. Decided March 31, 1898.]

B. L. GORDON *et al.*, *Appellants*, v. KATE DECKER *et al.*, *Appellants*.

MORTGAGES — ATTORNEYS' FEES — ASSIGNMENT OF NOTE AND MORTGAGE AFTER MATURITY — EQUITIES.

Where an attorney's fee is provided for in terms in a note or mortgage the same must be allowed by the court regardless of its reasonableness, if the instrument was executed prior to the taking effect of the law permitting the court to fix such amount as it may deem reasonable. (Laws 1895, p. 81, Bal. Code, § 5166.)

Where a note is bought after maturity, the purchaser takes it subject to all the equities that existed between the original parties to its execution, and the fact that the maker has seen fit to

Mar. 1898.]

Argument of Counsel.

place a demand arising out of the transaction in the shape of a judgment, will not estop him from pleading his equities against a purchaser of the note after maturity.

Appeal from Superior Court, Spokane County.—Hon. L. H. PRATHER, Judge. Modified.

Kennan & Belden, for plaintiffs.

Samuel R. Stern, for defendants:

A total failure of title is a total failure of consideration. The obligation of a purchase money mortgage is not made for a covenant of the mortgagee, but for the land; and if the land fails to pass, the promise of the mortgagor is a mere *nudum pactum*. 2 Jones, Mortgages (5th ed.), § 1504; *Wilber v. Buchanan*, 85 Ind. 46; *Rice v. Goddard*, 14 Pick. 293; *Frisbee v. Hoffnagle*, 11 Johns. 50; *Tyler v. Young*, 35 Am. Dec. 116; *Gans v. Renshaw*, 44 Am. Dec. 152. A mortgagor may set off the value of the land to which title has failed. *Smith v. Newton*, 38 Ill. 230; *Couse v. Boyles*, 4 N. J. Eq. 212 (38 Am. Dec. 514); *Akerly v. Vilas*, 21 Wis. 110 (1 Am. Rep. 166); *Hall v. Gale*, 14 Wis. 54; *Walker v. Wilson*, 13 Wis. 522.

“Where the contract is executed by deed, with covenants of general warranty of title, the rule undoubtedly is that the measure of damages for failure of title in the absence of fraud, is limited to the purchase money and interest, or, in other words, to the price of the land, at the date of the deed. . . . Interest is added to the amount of the consideration, unless the land is improved, and the purchaser has been in possession.” *Tyson v. Eyrick*, 21 Atl. 636 (23 Am. St. Rep. 287); *Comegys v. Davidson*, 26 Atl. 618; *Potwin v. Blasher*, 9 Wash. 460; *Hunt v. Chapman*, 51 N. Y. 555; *Isham v. Davidson*, 52 N. Y. 237; 2 Jones, Mortgages (5th ed.), § 1506.

The opinion of the court was delivered by

DUNBAR, J.—On the 17th day of November, 1890, the defendants Kate Decker and Henry Decker executed and delivered to one August Schulze two promissory notes of even date therewith, one for the sum of \$1,500 and the other for the sum of \$2,500, bearing interest at the rate of ten per cent. per annum from date, as consideration for the real estate then purchased by them of said Schulze, and a mortgage was given on said real estate for the security of the above described notes. It is conceded that the \$1,500 note has been paid and is therefore not for consideration in this case. According to the findings of the court (and we will say here that we have examined the record and think that the findings of fact found by the court are sustained by the testimony, and we will therefore consider the case from the standpoint of the court's findings, as far as they go), on the 4th day of December, 1891, \$1,925 was paid on the \$2,500 note, and at that time it was discovered that the title of the portion of real estate which had been sold to the mortgagors had failed and that the said Schulze had not made, and could not make, a good and sufficient title thereto to the said defendants, and thereupon Schulze and one Kingman, who was then interested with said Schulze in said mortgage and unpaid note, made, executed and delivered to the defendant Kate Decker an agreement in writing whereby it was agreed that until such time as one L. C. Dillman should make, execute and deliver to the defendant Kate Decker a warranty deed for that certain described strip of real estate, \$700 of said note should not be paid; and at the time of executing said agreement it was understood by the parties thereto that the title to said strip of real estate was in the said Dillman. The court finds that no warranty deed to said strip of land was ever executed or tendered to the defendants or either

Mar. 1898.] Opinion of the Court—DUNBAR, J.

er of them by said Dillman or by any one else; that after maturity of said unpaid note the said Schulze and Kingman assigned and delivered the same to one O. D. Dahl, who took the same with knowledge of said failure of title of said strip of land and the postponement of the payment of said \$700; that after the maturity of the said note the said Dahl transferred and delivered said unpaid note to the plaintiffs as collateral security for a debt owing by him to them and that they then took said note with knowledge of the failure of the title to said described strip of land and with knowledge of the postponement of the payment of the said \$700; that afterwards the defendant Kate Decker duly recovered a judgment in the superior court of Spokane county against August Schulze for the sum of \$700 damages and \$69 costs, which judgment was to draw interest at the rate of ten per cent. per annum as damages for the breach of warranty of title to said described strip of land heretofore referred to in the findings; and that no appeal has been taken from said judgment and that the time for appeal therefrom has expired.

The conclusion of law was that the plaintiffs were entitled to judgment against the defendants in the sum of \$2,500, and interest thereon at the rate of ten per cent. per annum from the 17th day of November, 1890, less the sum of \$1,925 paid on said note on the 4th day of December, 1891, and also less the sum of \$700, which should be credited upon said note as of the 25th day of September, 1895, and in accordance with the calculation made judgment was entered in favor of the plaintiffs for the sum of \$599.48 and costs, which \$599.48 includes, if we understand the record, \$50 allowed by the court as a reasonable attorney's fee. Both parties to the record appealed from this judgment. It is contended on the part of the appellants Gordon and Holt that they were in no way responsible for the

amount involved in the judgment against Schulze, that the defendants had elected to hold Schulze responsible for the damages and that they were thereby estopped from charging the plaintiffs with any set-off or counter-claim which they had against Schulze. They also allege error of the court in not awarding them \$300 attorney's fee as provided in the mortgage, while the defendants (appellants) allege error on the part of the court in that instead of computing interest in their favor on the \$700 from the time of the settlement when the time was extended and the payment of \$1,925 was made, the court allowed them interest only from the time that judgment was rendered for the \$700 against Schulze. On the proposition of the attorney's fee this court has held in *Scholey v. De Mattos*, 18 Wash. 504, and in many prior cases, that where an attorney's fee is provided for in terms in a note or mortgage the same must be allowed by the court regardless of its reasonableness, and we think, therefore, the court erred in not allowing the plaintiff an attorney's fee of \$300. We think, however, that on the main proposition the plaintiffs' contention cannot be sustained. It is the well settled law that where a note is bought after maturity the purchaser takes it subject to all the equities that existed between the original parties to its execution, whether it is taken with or without notice of the existing equities, and in this case the court found that the note and mortgage were taken with notice. Nor can the defendants be estopped from pleading that equity in this case because they saw fit to place their demand in the shape of a judgment. The assignee cannot be allowed to intrude himself between the original parties to the note and destroy any equity which the maker of the note had, or any defense which he had to it before it matured. We think, therefore, that the court properly found that the \$700 should be deducted from the amount due on the judgment. But we think the court

Mar. 1898.] Opinion of the Court—DUNBAR, J.

erred not only in not allowing interest on the \$700 from the time the agreement was made, but also in not allowing it on the \$700 from the time the notes were executed, for if the damages were that much by reason of the title failing the defendants should not be called upon to pay interest on this amount at all. Subtracting, then, the \$700 from \$2,500, we have \$1,800 upon which the interest at ten per cent. should be computed up to January 4, 1892, the date of the payment of \$1,925. The interest up to that date in round numbers is \$202, making \$2,002 due. Subtracting the payment, \$1,925, from that amount, we have \$77 balance due on the mortgage January 4, 1892. This amount would bear interest at ten per cent. to the date of the trial, January 21, 1897, which, in round numbers, would be \$39, making \$116. But the defendants in this action would also be entitled to credit for the costs of \$69.60 awarded to them in the judgment for \$700, with interest on the same at seven per cent. from the date of the judgment, viz.: September 25, 1895, to the date of the present judgment, March 2, 1897, which in round numbers amounts to \$76. Deducting \$76 from \$116, and adding the difference to \$300, which should be allowed as attorney's fee, we find the amount which was properly due plaintiffs to be \$340 instead of \$599.48, which was the amount awarded them by the court.

The cause will therefore be reversed, with instructions to modify the judgment as above indicated. The appellants Decker and Decker will recover the costs of this appeal.

ANDERS, GORDON and REAVIS, JJ., concur.

[No. 2835. Decided April 1, 1898.]

19	194
121	167

THE OLD NATIONAL BANK, *Respondent*, v. O. K. GOLD
MINING COMPANY, *Appellant*.

APPEAL — NOTICE — PARTIES — APPEALABLE ORDER.

The failure to serve intervenors who have appeared in a cause with notice of appeal is ground for dismissal of the appeal, even though the intervenors have been permitted to dismiss their complaint in intervention after the appeal was taken.

An order sustaining demurrers to several affirmative defenses while other affirmative defenses and a general denial are left unaffected by the ruling, is not an appealable order, since such ruling does not in effect determine the action, and such questions can be reviewed on appeal from final judgment in the cause.

Appeal from Superior Court, Spokane County.—Hon.
WM. E. RICHARDSON, Judge. Appeal dismissed.

Farwell & McDonald, and *H. M. Stephens*, for appellant.

Jay H. Adams, for respondent.

The opinion of the court was delivered by

REAVIS, J.—Two appeals were taken in this case. Respondent commenced an action to recover judgment on its several promissory notes, alleged to have been executed by appellant. On the fourth of August, 1897, George J. and H. M. Goodhue filed their petition for leave to intervene, and on the same day an order of court was entered allowing the intervention. To the complaint stating the three several causes of action on the promissory notes, appellant, for answer, first denied every allegation of the complaint except the incorporation of respondent and appellant corporations. Appellant then set up a number of separate defenses, and also a counter-claim claiming damages and a judgment against respondent. To each defense and

Apr. 1898.] Opinion of the Court—REAVIS, J.

counter-claim plaintiff interposed a demurrer. The demurrer was overruled as to four defenses and sustained as to two, and sustained against the counter-claim and the counter-claim dismissed. The court also sustained a motion of respondent requiring appellant to elect between defenses, or upon which defense it would proceed to trial, for the reason that the court deemed defense number one inconsistent with the others. The order sustaining the demurrer to the two defenses and the counter-claim was filed on the 28th of October, 1897, and the defendant thereupon gave notice in open court of appeal. A reply was filed and the case put at issue. On November 23, the court on its own motion entered an order dismissing the counter-claim. On November 26 the court made an order sustaining the motion of the plaintiff requiring defendant to elect on which of the inconsistent defenses it would go to trial. On November 27 appellant filed a second notice of appeal, accompanied by a bond, from the several orders heretofore mentioned. Respondent has filed a motion to dismiss the appeal on the grounds that it affirmatively appears from the record that this court is without jurisdiction of the appeals, that the record is silent as to any notice of appeal being given to the intervening defendants Goodhue, and that no bond was filed in pursuance of the notice of appeal given in open court on the 28th day of October from the order of the court sustaining the demurrer to the counter-claim and the two defenses, and therefore that the appeal was ineffectual after fifteen days, and because none of the orders appealed from are the subjects of appeal within the purview of the statute.

From the supplemental record brought here by appellant it appears that a bond on appeal was duly executed and filed within five days after the notice of appeal given in court on the 28th of October, 1897. It also appears that the intervenors Goodhue were dismissed from the action

at their own request on the 27th day of December, 1897. But this dismissal of the intervenors after the appeal was taken would not cure the failure to serve them with notice while they were still parties who had appeared in the cause. Then the second notice of appeal was defective in its service in not serving all who had appeared in the cause, and for that reason the appeal founded thereon must be dismissed. But the first notice in open court was duly perfected and the record brought here brings up the appeal from the order of the court sustaining the demurrer to the two defenses and to the counter-claim, and presents the question whether such orders are the subject of an appeal. The statute (Laws 1893, p. 119, § 1, subd. 6, Bal. Code, § 6500) is as follows, which provides that an appeal may be taken:

“From any order affecting a substantial right in a civil action or proceeding, which either, (1) in effect determines the action or proceeding and prevents a final judgment therein; or (2) discontinues the action;”

The language of the statute seems to be clear. The order must in effect determine the action and prevent a final judgment or discontinue the action. It is maintained, however, by appellant that the orders are appealable under the announcement made by the court in *Snohomish County v. Ruff*, 15 Wash. 637 (47 Pac. 35, 441). That was an action on the official bond of the county auditor, and one among several allegations made was that the auditor was *ex officio* clerk of the board of county commissioners, and in such capacity had received money and failed to account for \$1,818.71. The suit was against the auditor and his sureties on his official bond. The motion to strike this allegation from the complaint was granted by the superior court and the county appealed therefrom. All that this court said was:

Apr. 1898.]

Opinion of the Court—REAVIS, J.

“It is next contended that it was not an appealable order, but this cannot be sustained, for it affected a substantial right and determined the action as to the particular matter in issue, and was in effect a judgment against the plaintiff thereon.”

This court in *McElwain v. Huston*, 1 Wash. 359 (25 Pac. 465), held that

“An order of the superior court striking out a portion of the defendant’s answer is not an appealable order;”

and in *Olsen v. Newton*, 3 Wash. 429 (30 Pac. 450), it was held that an order sustaining a demurrer to plaintiff’s complaint, when no final judgment was entered, was not appealable. In the case at bar a demurrer to two defenses and the counterclaim contained in the answer was sustained. The statute of appeals declares that not only must a substantial right be affected, but it must in effect determine the action or proceeding and prevent a final judgment. Certainly in this case the whole cause of action stated in the complaint was left unaffected and the general denial of defendant, together with several affirmative defenses, was left unaffected after the ruling upon the demurrers. The action therefore was not in effect determined. It was ready for trial, and the orders of the superior court sustaining the demurrers were all such orders, when properly excepted to, as could be reviewed here on appeal from final judgment entered in the cause. Certainly, if the defendant sustained its general denial to the complaint, judgment would be entered in its favor with which it might be satisfied. We do not believe our statute contemplates such appeals by piecemeal from a cause still pending in the superior court. In the case of *Snohomish County v. Ruff*, *supra*, two of the judges dissented, one not stating the grounds of his dissent and the other refusing to concur in the disposition made of the motion to dismiss the appeal. The discussion by the

court of whether the order was appealable is confined to five lines in the opinion and evidently the court's attention was principally directed to the merits of the cause in the argument of counsel, and in the opinion rendered. We conclude that the motion to dismiss the appeal on the ground that the orders appealed from are not within the provisions of the statute must prevail.

Dismissed.

ANDERS, J., concurs.

DUNBAR, J.—I concur in the result and in all that is said in the opinion, but, upon further consideration of the questions involved in the case of *Snohomish County v. Ruff*, I think that case should be directly overruled.

GORDON, J.—For the reasons given in the opinion and, further, upon authority of *Freeman v. Ambrose*, 12 Wash. 1 (40 Pac. 381), I concur in dismissing the appeal.

[No. 2876. Decided April 4, 1898.]

THE STATE OF WASHINGTON, *on the Relation of Alfred Maylor*, v. SUPERIOR COURT OF ISLAND COUNTY AND THE HON. J. G. McCLINTON, *Judge*.

TIDE LANDS — APPEAL FROM DECISION OF COMMISSIONERS.

Where an application for the purchase of tide lands is contested by two other claimants for separate parcels thereof, and all the applications are tried before the board as one proceeding and findings made against the original applicant, such applicant is entitled to bring the matter up for review before the superior court by one appeal as against both contestants, under Laws 1897, p. 254, § 52 (Bal. Code, § 2182.)

Original Application for Writ of Prohibition.

McCutcheon & Gilliam, for relator.

Allen Weir, for respondents.

Per Curiam.—This is an application for a writ to prohibit the respondent from proceeding with the appeal of one Mary Morse from a decision against her in favor of the relator and one Ely, rendered by the board of state land commissioners in the matter of a contest relating to applications to purchase tide lands. Said Morse made the first application to purchase. The relator thereafter applied to purchase a part of said lands and Ely applied to purchase another part. It does not appear that either Ely or Maylor was interested in the other's application, but they both resisted Morse's application on a common ground. The whole matters were heard by the board at one time, and one judgment was rendered in favor of the relator and Ely, whereupon Morse applied to the superior court as against both of them, giving one bond under § 52, p. 254, Laws 1897 (Bal. Code, § 2182), which provides for the manner of taking appeals from said board. The relator moved to dismiss the appeal on the ground that the court had no jurisdiction, in consequence of but one appeal having been taken as against the relator and Ely, while their rights were separate and independent of each other. The court denied the motion and the relator has applied for a writ of prohibition as aforesaid. We do not think the writ should issue under the facts shown, although Maylor and Ely were insisting upon separate rights and the fact that Morse was interested against both of them and that her rights as against each depended upon the same state of facts did not make it a joint proceeding, for enough appears to indicate that it was tried before the board as one proceeding, and such having been the case, one appeal could have been taken therefrom.

At least, it does not appear to be a case where a writ of prohibition should issue. It does not appear that the bond was attacked in anywise in the lower court, and we see no reason why the relator's rights cannot be fully protected. The same strictness ought not to obtain with reference to an appeal from the board aforesaid, as would obtain in an appeal from a superior court to this court.

Writ denied.

[No. 2515. Decided April 6, 1898.]

FRANKLIN SAVINGS BANK, *Appellant*, v. THOMAS MORAN
et al., *Respondents*.

DIKES — REASSESSMENT FOR COST OF CONSTRUCTION — LEGISLATIVE
POWER — PLEADING — DEMURRER.

The legislature has power to provide for a re-assessment of property for local improvements in cases where the original assessment was void because of lack of legislation authorizing it, but a re-assessment made without legislative sanction is utterly ineffectual and void.

The act of March 19, 1895 (Laws 1895, p. 142, Bal. Code, §§ 3755-3762), entitled, "an act providing for the payment of expenses incurred in compliance with an act entitled 'an act to provide for the construction, repairing and protection of drains and ditches for agricultural, sanitary and domestic purposes and to provide for the organization of drainage districts and declaring an emergency,' approved March 19, 1890," while authorizing re-assessments to pay for construction of drains and ditches, makes no provision in regard to dikes and cannot be held as authorizing a re-assessment to cover the expense of dikes and dams constructed under a void statute.

The fact that a demurrer admitted the averment that a dike had been constructed under the provisions of the invalid drainage law of 1890, instead of the invalid law of 1888, would not make the curative act in relation to void drainage proceedings applicable to the case at bar, since courts are powerless to grant relief which is not warranted by the statute invoked by the pleader.

Apr. 1898.] Opinion of the Court—ANDERS, J.

Appeal from Superior Court, Snohomish County.—Hon. JOHN C. DENNEY, Judge. Affirmed.

Kerr & McCord, for appellant.

J. H. Naylor, Prosecuting Attorney, for respondents.

The opinion of the court was delivered by

ANDERS, J.—This was an application by the appellant to the superior court of Snohomish county for a writ of mandate commanding the county commissioners, auditor and treasurer of Snohomish county to proceed with the re-assessment of certain lands in the Eby Island Diking District, under the re-assessment act of March 19, 1895 (Laws 1895, p. 142, Bal. Code, §§ 3755-3762). The affidavit upon which the application for the writ was based shows substantially that, in pursuance of a petition filed by certain persons, a diking district was established by the county commissioners of Snohomish county, under the provisions of the act of the legislature entitled "An act to provide for the construction, repairing and protection of drains and ditches for agricultural, sanitary and domestic purposes, and to provide for the organization of drainage districts, and declaring an emergency," approved March 19, 1890 (Session Laws 1890, p. 652; 1 Hill's Code, title 21, ch. 1); that the route of a dike known as Eby Island Diike was located by the proper officials; that the cost of constructing said dike was duly ascertained and assessed and levied upon certain lands in the district; that a contract was awarded for the work to the lowest bidder therefor; that the dike was constructed in accordance with the contract; that warrants were drawn on the Eby Island dike fund in favor of the contractor in payment for said improvement by the county auditor, under the directions of the county commissioners, and duly approved by the diking master; that the appellant is the owner and holder of eight such warrants of the aggre-

gate value of \$8,035.98, exclusive of interest; that the respective owners of the lands benefited by the construction of said dike refused to pay the assessment against their lands for said improvement, although the same is just and equitable, and notwithstanding the fact that they petitioned the county commissioners to organize the district and to proceed with the improvement; that the county treasurer has refused and still refuses to pay said warrants, or any part thereof, although often requested so to do; that the original assessment was rendered invalid by the decision of the supreme court in holding the said act of March 19, 1890, unconstitutional in that it provided no method of acquiring the right of way, but did, in effect, provide for taking private property without compensation being first made, or ascertained and deposited in court for the owner, as provided by § 16 of article 1 of the state constitution; that no provision has been made by the county commissioners for the payment of said warrants, and that they have failed and refused to procure the right of way for said dike by condemnation, gift or purchase, and refused to make any new assessment for the payment of said indebtedness, or any part thereof, although fully authorized and empowered to procure said right of way and to make said re-assessment by said act of March 19, 1895. It appears from this affidavit that the proceedings of the county officials leading up to the construction of the improvement in question were in strict accordance with the provisions of said act of 1890, although we have only stated such facts as we deem material to a correct understanding of the case. Due notice of the application for the writ was served upon the respondents, and at the time fixed for its presentation to the court the county attorney of Snohomish county appeared and interposed a demurrer to the affidavit on the ground that it did not state facts sufficient to constitute a cause of action or to enti-

Apr. 1898.] Opinion of the Court—ANDERS, J.

the plaintiff to the writ of mandate. The court sustained the demurrer for the reason, as stated, that the law under which plaintiff was attempting to proceed is contrary to, and in violation of, the constitution of the state of Washington, and thereupon dismissed the action, at the cost of the plaintiff, and the latter appealed. Many authorities are cited by the appellant sustaining the proposition that the legislature has power to provide for a re-assessment of property for ordinary taxation, or for local improvements, in cases where the original assessment was void because of lack of legislation authorizing it, or by reason of a failure to comply with existing statutes. That this principle is firmly established as the law of this state is shown by repeated decisions of this court. See *Frederick v. Seattle*, 13 Wash. 428 (43 Pac. 364); *Cline v. Seattle*, 13 Wash. 444 (43 Pac. 367); *New Whatcom v. Bellingham Bay Improvement Company*, 16 Wash. 131 (47 Pac. 236). But we are aware of no case holding that a re-assessment may be made for any purpose without legislative authority, and we do not think that any such case can be found. In our opinion a re-assessment without such authority would be utterly ineffectual and void. It follows, therefore, that if the re-assessment sought by appellant is not specifically authorized by some valid law, the judgment of the court below should not be disturbed. Although the respondents do not seem expressly to concede the constitutionality of this act of March 19, 1895, they do not attempt to show wherein it is unconstitutional, but rely mainly, if not wholly, for an affirmance of the judgment upon the proposition that the law of 1895 has no reference to, and hence is no authority for, a re-assessment for dikes and dams. As already intimated, the affidavit for the writ of mandate in this case states facts showing that the county commissioners, in organizing the Eby Island Diking District, and in authorizing

the construction of the dike, followed the procedure prescribed by the act of March 19, 1890, relating to ditches and drains; and these facts must be deemed admitted by the demurrer. Why the parties interested did not proceed under the act of February 2, 1888 (Laws 1888, p. 90; 1 Hill's Code, title 21, ch. 2) relative to dikes and dams is not stated. The act of March 19, 1890, and that of February 2, 1888, as amended in 1890, have both been declared unconstitutional by this court for the reasons above indicated, the former in *Askam v. King County*, 9 Wash. 1 (36 Pac. 1097), and *Skagit County v. Stiles*, 10 Wash. 388 (39 Pac. 116), and the latter in *Snohomish County v. Hayward*, 11 Wash. 429 (39 Pac. 652). The act of 1895, which the appellant contends confers upon the respondents authority to procure the right of way for the Eby Island Dike and to re-assess the lands in the district for the expenses incurred in making the improvement, is entitled "An act providing for the payment of expenses incurred in compliance with an act entitled 'An act to provide for the construction, repairing and protection of drains and ditches for agricultural, sanitary and domestic purposes, and to provide for the organization of drainage districts, and declaring an emergency,' approved March 19, 1890, and declaring an emergency." Session Laws 1895, p. 142. It is provided in the first section of this act (Bal. Code, § 3755) that where any ditch or drain, or any portion thereof, has been constructed in compliance with the provisions of the act of March 19, 1890, aforesaid, it shall be the duty of the board of county commissioners of any county in which the same is located to purchase the lands occupied by, or necessary to, said drain or ditch or any culverts, bridges or approaches thereto, or appurtenances to said drain or ditch, or acquire the same by condemnation proceedings wherever title to such land has not already been obtained, and to that end

Apr. 1898.] Opinion of the Court—ANDERS, J.

are authorized to institute and maintain, in the name of the county, the proceedings provided in ch. 6 of title 9 of the Code of Procedure as arranged and annotated by William Lair Hill (Bal. Code, title 31, ch. 5, art. 3). An inspection will disclose that nothing whatever is said in this act in relation to dikes, and, assuming that it is constitutional and valid, the question arises, can it be so construed as to apply to cases like the one at bar? We think this question must be answered in the negative. That the legislature did not intend by this act to provide for the payment of expenses incurred in constructing dikes, is manifest from the language employed therein, from the title of the act, and from contemporaneous legislation. The same legislature that passed this remedial, or curative, statute in relation to drains and ditches enacted an elaborate law relative to dikes and dams in which they seem to have failed, probably through inadvertence, to provide for the payment of expenses incurred under the dike law of February 2, 1888, and the subsequent amendment thereto. Laws 1895, p. 304 (Bal. Code, §§ 3673-3715). It is earnestly insisted, however, by the learned counsel for the appellant that, inasmuch as the demurrer to the affidavit admits that the improvement was made under the ditch and drainage law of 1890, it necessarily follows that the curative statute of March 19, 1895, is applicable to the facts of this case. But we are unable to perceive how this law, which is relied on as authority for the enforcement of an alleged right, can be given a meaning contrary to the intention of the legislature, as clearly expressed therein, by the mere averments of the pleader. Conclusions of law are not necessarily admitted by a general demurrer, and the scope and effect of a statute must be determined by a consideration of the statute itself. And, if the relief demanded is not warranted by the statute, the court is powerless to grant it. The law

invoked by the appellant no more authorizes the respondents to order a re-assessment and levy for the payment of expenses incurred in constructing a dike than it would authorize them to do the same thing for the payment of the cost of building a railroad. It was enacted for a specific purpose, clearly expressed both in the title and in the body of the act, and no construction can make it apply to a different purpose or subject. We fully realize the justness of appellant's claim for relief. The owners of the land in the diking district have long enjoyed the benefit of this improvement and ought, by some means, to be compelled to pay for it. But neither the respondents nor this court can coerce them to discharge a moral obligation, however apparent it may be, without the authority of the law-making body. Judging by past legislation, we can scarcely doubt that the legislature, if appealed to, would pass an act granting relief to those who have honest claims for labor performed in the construction of dikes and dams, similar to this act of March 19, 1895. Conceding, as we are at present advised, that the act of March 19, 1895, is constitutional, it follows that the learned trial court gave a wrong reason for its decision, but we nevertheless think the decision was right, and the judgment is therefore affirmed.

SCOTT, C. J., and DUNBAR, GORDON and REAVIS, J.,
concur.

Apr. 1898.] Opinion of the Court—DUNBAR, J.

[No. 2827. Decided April 9, 1898.]

DAVID BETTMAN, *Appellant*, v. H. T. COWLEY, *Respondent*.

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—ACTION ON JUDGMENTS.

The act entitled "an act relating to the duration of judgments," etc., (Laws 1897, p. 52; Bal. Code, §§ 5148-5150), providing that liens on judgments shall expire six years after their rendition, and that no action shall be had on any judgment rendered in the state by which its lien shall be extended for a greater period than six years from the date of entry of the original judgment, is unconstitutional as to existing judgments on the ground that it is an impairment of the obligation of contracts. (REAVIS and GORDON, JJ., dissent.)

Appeal from Superior Court, Spokane County.—Hon. WM. E. RICHARDSON, Judge. Reversed.

Will G. Graves, for appellant.

Blake & Post, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is an action upon a judgment. Service of the summons and complaint was made, default of the respondent was noted and judgment entered against him on August 23, 1897. Thereafter respondent moved to set aside the default and judgment entered against him, which motion was sustained. It is stipulated that the respondent has no defense to the action other than the act of the legislature of 1897, approved March 6, 1897 (Laws 1897, p. 52; Bal. Code, §§ 5148-5150), entitled, "An act relating to the duration of judgments and repealing sections 462 and 463, volume 2, Hill's Code of Washington." The act is as follows:

19	207
19	707
19	307
120	224
120	806
19	207
221	400
21	401
19	207
23	411
23	416
19	207
24	103
19	207
28	421
19	207
38	628
19	207
39	219
39	588

“Section 1. After the expiration of six years from the rendition of any judgment it shall cease to be a lien or charge against the estate or person of the judgment debtor.

“Sec. 2. No suit, action, or other proceedings shall ever be had on any judgment rendered in the State of Washington by which the lien or duration of such judgment, claim or demand, shall be extended or continued in force for any greater or longer period than six years from the date of the entry of the original judgment.

“Sec. 3. When the lien of any judgment, as specified in section 1 of this act, has run six years, or its duration will be less than one year by reason of this act, then the lien of such judgment shall continue for one year from and after the taking effect of this act.

“Sec. 4. Sections 462 and 463 of volume 2, Hill's Code of Washington, relating to a renewal of judgments, are hereby repealed.”

And it is claimed that the act is unconstitutional as applied to judgments in existence at the time of the passage of the act. It is also contended by the appellant that the title of this act is not sufficient in that it embraces more than one subject, and the subject is not expressed in the title of the act. We do not think there is any substantial merit in this objection. In presenting our views in relation to the constitutionality of the act, it is not necessary to pass upon the other objections raised by the appellant. It is contended by the appellant that the application of this law to judgments already in existence is violative of § 10 of art. 1 of the constitution of the United States, and of § 23 of art. 1 of the constitution of the state of Washington, in that it is a law which impairs the obligation of contracts; and of art. 5, and of § 1 of art. 14 of the constitution of the United States, and of § 3 of art. 1 of the constitution of the state of Washington, in that it would deprive the appellant of his property without due process of law. We think that in any event, as applied to contracts existing at

Apr. 1898.] Opinion of the Court—DUNBAR, J.

the time the law was enacted, its enforcement would be an impairment of such contracts. It is insisted by the respondent that the United States supreme court has decided this question adversely to appellant's contention in *Morley v. Lake Shore & M. S. Ry. Co.*, 146 U. S. 162 (13 Sup. Ct. 54), in that it has decided that a judgment is not a contract, but we do not think that the court decided that contractual rights when merged into a judgment could not be enforced. The facts before the court must be ascertained to determine the principles of law which the court decides in a given case. The facts in that case were substantially as follows: An action was brought in the supreme court of New York by John S. Prouty against the Lake Shore & M. S. Ry. Co. *et al.*, to compel the specific performance of a certain contract. It was adjudged in January, 1878, that the company pay the plaintiff out of its net earnings \$53,184.88, together with interest thereon from the entry of said judgment. It was also adjudged that if the company within the time specified failed to pay to the plaintiff the above specified sum and such interest, the plaintiff might have execution therefor against the defendant. By the statutes of New York in force when this judgment was rendered seven per cent. was the legal rate of interest. Afterwards, in 1879 the legislature reduced the rate of interest to six per cent. The question came up on the right of the legislature to reduce the rate of interest on a judgment rendered when the rate was higher, and the court held in substance that where a judgment is obtained on a contract which contains no provision for interest, the allowance for interest on the judgment is a matter within the legislative discretion, that the judgment is not a contract and the law reducing the rate of interest thereon does not impair the obligation of contracts within the meaning of the federal constitution. It simply was determined by the court that, in that case, where

the judgment did not arise out of contract, the interest which was allowed by the state was allowed as damages for the non-performance of a payment of the judgment—damages which the state had a right to estimate and enforce—that no contractual obligation existed so far as the question of interest was concerned, but that the interest allowed having been allowed by the state as damages, the amount of such damages was within the control of the state, and therefore no obligation was impaired. Even in that case there was a very able dissenting opinion by Justice HARLAN, which was concurred in by Justice FIELD and Justice BREWER, holding that it was not only an impairment of a contract, but that the judgment was property, and that the rate of interest which the judgment drew was properly within the meaning of the constitution, and that the constitution was violated by the changing of the rate of interest by the legislature. But it is not necessary in this case to go to the extent to which the dissenting judges did in the case just reviewed. Reference was made in that case to *Louisiana v. Mayor*, 109 U. S. 285 (3 Sup. Ct. 211), which shows that the court was considering, and considering only, judgments which did not arise out of contract, and had no element of contract in them, and this is one of the cases also relied upon by the respondent in this case. This was an action brought by the holders of judgments recovered in the courts of Louisiana for damages done to the property of the plaintiffs by a mob or riotous assemblage of people in the year 1873. A statute of the state made municipal corporations liable for damages thus caused within their limits. At the time the injuries complained of were committed the city of New Orleans was authorized to levy and collect a tax upon property within its limits of one dollar and seventy-five cents upon every hundred dollars of its assessed value. Afterwards, by the constitution of the state,

Apr. 1898.] Opinion of the Court—DUNBAR, J.

the power of the city to impose taxes on property within its limits was restricted to ten mills on the dollar of the valuation, and it was asserted that the effect of this last limitation was to prevent the relators, who were not allowed to issue executions against the city, from collecting their judgments, as the funds receivable from the tax thus authorized to be levied were exhausted by the current expenses of the city, which must first be met, and this action was to compel the authorities of the city to provide for the payment of these judgments by a levy of an additional tax. Judge FIELD, in writing the opinion of the court in this case (and it may be noted that he was one of the judges who dissented in the *Morley case*, and therefore it cannot be concluded that he intended to lay down a doctrine which would be opposed to the doctrine of the dissenting opinion, viz., that the judgment was property, the taking of which without due process of law would fall within the inhibition of the constitution), said:

“The right to reimbursement for damages caused by a mob or riotous assemblage of people is not founded upon any contract between the city and the sufferers. Its liability for the damages is created by a law of the legislature, and can be withdrawn or limited at its pleasure. Municipal corporations are instrumentalities of the state for the convenient administration of government within their limits. They are invested with authority to establish a police to guard against disturbance; and it is their duty to exercise their authority so as to prevent violence from any cause, and particularly from mobs and riotous assemblages. It has, therefore, been generally considered as a just burden cast upon them to require them to make good any loss sustained from the acts of such assemblages which they should have repressed. . . . But, however considered, the imposition is simply a measure of legislative policy, in no respect resting upon contract, and subject, like all other measures of policy, to any change the legislature may see fit to make, either in the extent of the liability or in the

means of its enforcement. And its character is not at all changed by the fact that the amount of loss, in pecuniary estimation, has been ascertained and established by the judgments rendered. The obligation to make indemnity created by the statute has no more element of contract in it because merged in the judgments than it had previously."

And this was the sole ground upon which this case was decided. And as showing conclusively that a contractual relation would have compelled a different decision from this the opinion proceeds:

"The cases in which we have held that the taxing power of a municipality continues, notwithstanding a legislative act of limitation or repeal, are founded upon contracts; and decisions in them do not rest upon the principle that the party affected in the enforcement of his contract rights has been thereby deprived of any property, but upon the principle that the remedies for the enforcement of his contracts existing when they were made have been by such legislation impaired. The usual mode in which municipal bodies meet their pecuniary contracts is by taxation. And when, upon the faith that such taxation will be levied, contracts have been made, the constitutional inhibition has been held to restrain the state from repealing or diminishing the power of the corporation so as to deprive the holder of the contract of all adequate and efficacious remedy."

And the court cites approvingly the cases of *Wolff v. New Orleans*, 103 U. S. 358, and *Louisiana v. Pilsbury*, 105 U. S. 278, saying:

"In both cases by the unanimous judgment of the court, the legislation in that respect is subject to this qualification which attends all state legislation, that it 'shall not conflict with the prohibitions of the constitution of the United States, and, among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result, not indirectly as a consequence of legitimate measures

Apr. 1898.] Opinion of the Court—DUNBAR, J.

taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the constitution, and must be disregarded—treated as if never enacted—by all courts recognizing the constitution as the paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed.”

Justice BRADLEY, in his concurring opinion, makes it especially clear that he concurred in the opinion simply upon the ground that

“Remedies against municipal bodies for damages caused by mobs, or other violaters of law unconnected with the municipal government, are purely matters of legislative policy, depending on positive law, which may at any time be repealed or modified, either before or after the damage has occurred, and the repeal of which causes the remedy to cease.”

“But,” said he, “an ordinary judgment of damages for a tort, rendered against the person committing it, in favor of the person injured, stands upon a very different footing. Such a judgment is founded upon an absolute right, and is as much an article of property as anything else that a party owns; and the legislature can no more violate it without due process of law, than it can any other property. To abrogate the remedy for enforcing it, and to give no other adequate remedy in its stead, is to deprive the owner of his property within the meaning of the Fourteenth Amendment. The remedy for enforcing a judgment is the life of a judgment, just as much as the remedy for enforcing a contract is the life of the contract.”

So it will be seen from these cases, which are the principal and most pertinent cases cited on this question, not only by the opinions of the court, but also by the dissenting opinions in each case, that it was not the intention of the supreme court to lay down the rule that the destruction of a judgment in which a contract was merged by the legisla-

ture was not an impairment of the contract, and was not a deprivation of property within the meaning of the Fourteenth Amendment. But the supreme court has with uniformity spoken with no uncertain sound concerning the sacredness of contract rights, and of the protection of property under the constitutional guaranty referred to. These cases, without specially enumerating them, are many of them reviewed in the late case of *Barnitz v. Beverly*, 163 U. S. 118 (16 Sup. Ct. 1042), where the first quotation is from *Bronson v. Kinzie*, 1 How. 311, where the court, in discussing a question of what was a right and what was a remedy, said:

“Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution;”

citing, also, *McCracken v. Hayward*, 2 How. 608, where it was said:

“The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made. These are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning. When it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party to the injury of the other; hence any law, which in its operation amounts to

Apr. 1898.] Opinion of the Court — DUNBAR, J.

a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution."

And as showing the construction which must have been placed by the court itself on the opinion in *Louisiana v. Mayor, supra*, the court in this case quotes approvingly the case of *Seibert v. Lewis*, 122 U. S. 284 (7 Sup. Ct. 1190), where it was announced that it was the settled doctrine of the court that:

" ' The remedy subsisting in a state, when and where the contract is made and is to be performed, is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is therefore void, ' "

and that the legislature of Missouri having, by act of March 23, 1868, to facilitate the construction of railroads, enacted that the county courts should levy and cause to be collected in the same manner as county taxes a special tax in order to pay the interest and principal of any bond which might be issued by a municipal corporation in the state on account of the subscription authorized by the act to the stock of the railroad company, which tax should be levied on all the real estate within the township, making the subscription in accordance with the valuation then last made by the county assessors for county purposes, it must be held that it was a material part of this contract that such creditor should always have the right to the special tax to be levied and collected in the same manner as county taxes at the same time might be levied and collected. Here the action of the party came into effect. He entered into this contract on the strength of the law of the state of Missouri, and, having entered into it with reference to that law, the supreme court will not allow the state to pass any law which impairs that

obligation or in any way lessens the value of the contract. And in *Louisiana v. New Orleans*, 102 U. S. 203, Mr. Justice FIELD, in the opinion of the court, said:

“The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened.”

The language of the learned judge might well be applied in the interest of the appellant in this case. The means provided by the law for the enforcement of the contract at the time the contract was made and by which it could be enforced has been taken away by the legislature. The action of the legislature has not only tended to lessen the efficacy of the means which then existed, it has not only tended to retard the enforcement of the contract, but it has destroyed the means of its enforcement altogether, and has supplied no other means in its stead. It is the contention of the respondent, however, and indeed that is his main contention, that this act of the legislature is a statute of limitation in effect, and numerous cases are cited where statutes of limitation have been sustained, but we think there is a vast difference between the act in question here and the acts which were construed in the cases cited by respondent. The governing principle in this case is altogether different from the principle underlying statutes of limitation. Statutes of limitation are statutes of repose, intended to put at rest controverted questions of fact, to insure to a degree certainty in testimony by compelling its production before it is affected by the infirmities of memory, thereby giving value to contracts. Such statutes are in the interests of morals, serving to prevent perjuries, frauds and mistakes, hence they subserve public interests and fall with-

in the special authority of the legislature, which in the exercise of its discretion can regulate them, providing, always, that, where a statute of limitation is shortened, a reasonable time must be allowed to commence the action or present the claim. This constitutes no deprivation of a substantial right. It does not even change the remedy. It is a mere change in the time at which the remedy is to be applied, which can go no further than a possible inconvenience, and it is upon this theory that the shortening of the statutes of limitation are sustained. The creditor's rights are in nowise impaired. He is deprived of no remedy. His substantial right, viz., to collect his debt, remains. It is true he must reduce his claim to a judgment sooner than he was required to do, but when it is so reduced he can perpetuate his judgment, and the time for collecting the fruits of the judgment is not shortened. In this case, when the original judgment was obtained, the creditor had a right to perpetuate his judgment either by a suit on the same, or by keeping it alive under the provisions which the law under consideration repeals, and the shortening of the time in which he could bring his action, as we have seen, in nowise rendered his judgment less valuable, for, notwithstanding the shortening of the statute of limitations, there was no shortening of the life of the liability. If the creditor or claimant does not obey the law when a reasonable time is given him in which to act, his loss is attributable to his own laches and not to matters which are beyond his power to control. But altogether another principle is involved in the shortening of the life or of the actual demolition of the liability. If the debtor happens to be execution proof just at this time, the creditor is helpless. No amount of diligence or industry will avail him. His judgment, which, before the passage of the law, had at least a prospective value, is now rendered absolutely valueless, and the future

acquisitions which he had a right to rely upon he is now deprived of. The proposition is too well settled to call for discussion, that there is read into every contract the law which was in existence when the contract was entered into, or, in other words, that the parties to a contract have the right to rely upon the law governing the contract at the time it was made, and that law which could reasonably have been taken into consideration will be presumed to have been taken into consideration. It is a matter of common knowledge that many young men in this country, where the avenues of wealth are open to all who are intelligent, industrious and frugal, who are known to be absolutely penniless, if they are known to possess the qualities mentioned above, can obtain money upon the strength and credit of their future earnings and accumulations, and the right to look to these future earnings and accumulations, under the law as it existed at the time the credit was given, is a valuable right and may well be said to have been taken into consideration when the credit was given. A special review of all the authorities cited by the respondent showing that this act is in the nature of a statute of limitation will be profitless, for we think that none of them are cases of this kind. Here a right to a remedy—a remedy which is essential to the recovery of a debt—is not postponed, is not shortened, but is virtually destroyed, and we think without any question that the obligation is impaired, if, indeed, the judgment is not property, which under this law could be taken without due process of law. We therefore hold that the act in question is unconstitutional so far as it refers to contracts which were in existence at the time the law was enacted. We should have stated in the beginning that, so far as the common law right to sue on a judgment is concerned, especially in this state where the common law is the law of the state in the absence of statutory enactment,

Apr. 1898.]

Dissenting Opinion — REAVIS, J.

the right is so overwhelmingly sustained by the authorities, that it is profitless to discuss it.

The judgment is reversed, and the cause remanded, with instructions to overrule the motion to set aside the default and judgment.

SCOTT, C. J., and ANDERS, J., concur.

REAVIS, J. (dissenting).—The act of the legislature under consideration, and set out in the opinion of the majority of the court, in § 4 expressly repeals the former law of the state relating to a renewal of judgments. I do not understand that the opinion questions the power of the legislature to make this repeal, and that it is a valid act of the legislature; but to decide only that it cannot relate to contracts in existence before the enactment of the law. The only constitutional questions, then, are whether the law approved March 6, 1897, impairs the obligation of contracts or takes property without due process of law. No case from any court has been presented by counsel for appellant which in my judgment aids in the solution of the controversy, excepting those from the supreme court of the United States, which are also cited by respondent. It is claimed that the case of *Morley v. Lake Shore & M. S. Ry. Co.*, 146 U. S. 162 (13 Sup. Ct. 54), does not decide that when contractual rights are merged into a judgment they cannot be enforced, and the facts before the court are referred to to sustain this view. The facts in that case seem to be plain. It was a suit to compel the specific performance of a contract and a money judgment was entered thereon in pursuance of the contract, and, if the defendant did not pay the sum specified and interest specified, plaintiff might have execution against the defendant. When the judgment was rendered the legal rate of interest was seven per cent. This rate was afterwards reduced by the legislature to six per

cent. The court held that the judgment was obtained on a contract which contained no provision for interest, and that the allowance of interest was a matter of legislative discretion. Now the point mentioned by appellant, that interest on the judgment was in the nature of statutory damages, and was therefore no part of the contract upon which judgment was obtained, was one decided in the case. But I think the question was also clearly raised and a precise declaration of opinion at any rate, that a judgment obtained upon a contract is not a contract within the protection of the constitution. The court said:

"It is contended on behalf of the plaintiff in error, as stated above, that the judgment is itself a contract, and includes within the scope of its obligation the duty to pay interest thereon. As we have seen, it is doubtless the duty of the defendant to pay the interest that shall accrue on the judgment, if such interest be prescribed by statute, but such duty is created by the statute, and not by the agreement of the parties, and the judgment is not itself a contract within the meaning of the constitutional provision invoked by the plaintiff in error. The most important elements of a contract are wanting. There is no *aggregatio mentium*. The defendant has not voluntarily assented or promised to pay. . . . Where the transaction is not based upon any assent of parties it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the constitutional prohibition. *Garrison v. City of New York*, 21 Wall. 196, 203. It is true that in *Louisiana v. New Orleans*, and in *Garrison v. City of New York*, the causes of action merged in the judgments were not contract obligations; but in both those cases, as in this, the court was dealing with the contention that the judgments themselves were contracts *proprio vigore*."

It will be observed in this case the supreme court discussed the very question of the distinction between judgments on torts, and which it had theretofore held were not contracts within the constitutional prohibition, and judg-

Apr. 1898.]

Dissenting Opinion — REAVIS, J.

ments on contracts, and held that the judgment is not a contract because the most important elements of a contract are wanting, *i. e.*, the *aggregatio mentium*. Now, the cases cited by counsel for appellant sustaining Blackstone's definitions of judgments are not at this day entirely correct. The very refined theories upon which Blackstone's definition is sustained are merely interesting from an antiquarian and historical standpoint. See *Freeland v. Williams*, 131 U. S. 405 (9 Sup. Ct. 763); *Louisiana v. Mayor of New Orleans*, 109 U. S. 285 (3 Sup. Ct. 211); *Connecticut Mut. Life Ins. Co. v. Cushman*, 108 U. S. 51 (2 Sup. Ct. 236). The appellant (plaintiff below) holds the contract of the defendant to pay a certain sum of money. Unquestionably the law for the enforcement of the contract, or rather the remedy existing at the time the contract was entered into, cannot be impaired by the state. But what was the remedy existing at that time? It was the right of action against the defendant for his breach of the contract—his failure to pay the note when due—and to recover a judgment against defendant upon which an execution could issue against all his property not exempt from execution. And by the then existing law the judgment so recovered against defendant was a lien and the judgment and the lien existed together for six years. It was written in the law creating this judgment that its existence, together with that of the lien thereunder, was for six years. At the end of that time, by the law of its creation, the judgment was dead. It is true that another statute provided for the revival of the judgment. The latter statute, I think, was merely a voluntary act of the legislature and not founded on any contract, but solely a question of public policy, and I do not think that by any force of reasoning it can be held that the parties in entering into the original contract had in mind such a remedy, and it was no part of

the original contract. And so, too, with the lien which the original judgment here gave the plaintiff. It was strictly a part of the remedy confined to the original judgment. The plaintiff having brought his action and obtained his judgment the contract then became absolutely merged in the judgment and all the legislature has done in the act of 1897 is to take away the sanction of the state to a resurrection and revivification of a dying judgment. I think also the statute of 1897 is in the nature of a law of limitation. Limitation may be applied to remedies as well as to rights of action. They are alike in principle. *Drury v. Henderson*, 143 Ill. 315 (32 N. E. 186); *Merchants' Ins. Co. v. Hill*, 86 Mo. 466; *Tennessee v. Sneed*, 96 U. S. 74; *Bronson v. Kinzie*, 1 How. 311; *Sanger v. Nightingale*, 122 U. S. 176 (7 Sup. Ct. 1109); *Terry v. Anderson*, 95 U. S. 628. In the last case the supreme court of the United States discussed the reasonableness of the time before the bar of limitations attached, and said:

"Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed. In judging of that, we must place ourselves in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surrounded them, as nearly as possible; for what is reasonable in a particular case depends upon its particular facts. . . . The business interests of the entire people of the state had been overwhelmed by a calamity common to all. Society demanded that extraordinary efforts be made to get rid of old embarrassments, and permit a reorganization upon the basis of the new order of things. This clearly presented a case for legislative interference within the just influence of constitutional limitations. For this purpose the obligations of old contracts could not be impaired, but their prompt enforcement could be insisted upon or an abandonment claimed. That, as we think, has been done here, and no more."

Apr. 1898.]

Dissenting Opinion — REAVIS, J.

In that case a note was barred within nine months and seventeen days, *i. e.*, a nine months' limitation was upheld, *Rexford v. Knight*, 11 N. Y. 308; *People v. Turner*, 117 N. Y. 227, (22 N. E. 1022; 15 Am. St. Rep. 498); *Jackson v. Lamphire*, 3 Pet. 280. In *People v. Turner, supra*, six months was held a reasonable limitation within which to do an act after the passage of the law. *Vance v. Vance*, 108 U. S. 514 (2 Sup. Ct. 854). In *Curtis v. Whitney*, 13 Wall. 68, it was said:

"Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation. For such legislation demanded by the public good, however, it may retroact on contracts previously made, and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the federal constitution, so long as the obligation of performance remains in full force."

And in *Vance v. Vance, supra*, the same court said of the state statute:

"It is in its nature a statute of limitations. The right of the state to prescribe the time within which existing rights shall be prosecuted, and the means by and conditions on which they may be continued in force, is, we think, undoubted. Otherwise, where no term of prescription exists at the inception of a contract, it would continue in perpetuity, and all laws fixing a limitation upon it would be abortive. Now, it is elementary that the state may establish, alter, lengthen or shorten the period of prescription of existing rights, provided that a reasonable time be given in future for complying with the statute."

But a distinction is drawn between the limitation on the right to commence an action and the limitation on the right to issue an execution or the duration of a lien. I can

see no difference. The judgment creditor has his full six years under his judgment in which to make his levies. If he does not, then his right may or may not be renewed in the discretion of the legislature. It is not a matter of contract. As said in *Louisiana v. New Orleans*, 109 U. S. 285 (3 Sup. Ct. 211), also mentioned in the opinion of the majority:

“A party cannot be said to be deprived of his property in a judgment because at the time he is unable to collect it.”

Thus the legislature of 1897 did not attempt to destroy the contract, if any existed, between plaintiff and defendant, but did withdraw a contingent remedy upon such contract, but which was not a part of the original contract. The contract, if one please, may be said to exist, but without remedy to enforce its moral obligation. *Phalen v. Virginia*, 8 How. 163; *Campbell v. Holt*, 115 U. S. 620 (6 Sup. Ct. 209); *Gittings v. Stearns*, 19 Ill. 376; *Bell v. Roberts*, 13 Vt. 582. It is questionable whether the common law right to bring an action on judgments exists as a strict matter of right in this state. This right to institute an action has been frequently questioned by the ablest jurists and many courts upholding the right have granted it with reluctance, and it has been denied by some authorities. It seems upon principle to be a useless and expensive proceeding to allow a plaintiff to commence an action upon a judgment the day after it has been entered, and thus to put it within his power to accumulate costs and distress the defendant unnecessarily. It would seem that the courts should have the power to restrain the abuse of such action, and this evidently was the view held by this court in *Abernethy v. Town of Medical Lake*, 9 Wash. 112 (37 Pac. 306), where the court refused to allow an action to be maintained upon a municipal warrant for the reason that any judgment obtained thereon could only be satisfied by the issuance of

a like warrant, and that therefore there was no necessity for, nor advantage growing out of, such action. The principle decided in that case was surely the same as that in a suit upon a judgment because the judgment creditor in all cases has the right to his execution on the first judgment, and it is the only right he obtains by his action upon a judgment and the recovery of the second judgment. See *Pitzer v. Russel*, 4 Ore. 124; Freeman, Judgments (4th ed.), § 449; Freeman, Executions (2d ed.), ch. 8; which are in consonance with the views expressed here. And I do not think the common law right to commence an action on a judgment in this state is a strict one, but more in the nature of a *permissive* one. I cannot conclude that the statute of 1897 under discussion is unconstitutional when applied to existing or prior judgments at the time of its enactment.

GORDON, J.—I concur in the views expressed by Justice REAVIS.

[No. 2763. Decided April 11, 1898.]

THE PHILADELPHIA MORTGAGE AND TRUST COMPANY,
Respondent, v. CITY OF NEW WHATCOM, J. J. WEISEN-
BURGER, *Mayor, et al., Appellants.*

MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS — RE-ASSESSMENTS
— INTEREST — MANDAMUS.

In making a re-assessment to cover the cost of a street improvement, the original assessment for which had been declared void, the city should, under Laws 1893, p. 229, § 6 (Bal. Code, § 1144), include in such new assessment the accrued interest upon the sums due for making such improvement.

The failure of a city in making a re-assessment to provide a special fund to pay for a street improvement, to include accrued

15-19 WASH.

19	225
25	212
19	225
25	212
19	225
25	212
128	653
128	654

interest therein, will render the city liable for the amount of such interest, although the creditor against such fund may have taken no action to have the city include such interest in the re-assessment proceedings.

Where a city has provided a special fund by re-assessment proceedings to pay for the cost of a street improvement, owing to the invalidity of the original assessment, and make such re-assessment cover only the actual cost of the improvement without the accrued interest, mandamus will lie to compel the city to apply moneys in such special fund to the payment of the oldest outstanding warrant together with the accrued interest thereon, even though the fund will be exhausted thereby to the exclusion of some of the outstanding warrants.

Appeal from Superior Court, Whatcom County.—Hon. H. E. HADLEY, Judge. Affirmed.

S. W. Freeman, for appellants:

The property owner was and is entitled to have a valid assessment upon his property before he can be asked or expected to pay, and until that has occurred and the assessment become delinquent, he could not, under any theory of the law, be compelled to pay interest (if he can or could be compelled to pay interest at all) on the assessment. The assessment, styled a "re-assessment," is in fact the only assessment for the same tax—the first being only an attempt and a failure. *Welty, Assessments*, § 198. "A tax never bears interest, either as interest or damages, except by force of statute." *State v. Baldwin*, 62 Minn. 518; *Texarkana Water Co. v. State*, 62 Ark. 188; *Commonwealth v. Owensboro, etc., R. R. Co.*, 23 S. W. 868; *Camden v. Allen*, 26 N. J. Law, 398; *Lane County v. Oregon*, 7 Wall. 71 (19 Law. ed.); *Meriwether v. Garrett*, 102 U. S. 513 (26 Law. ed.); *Commonwealth v. Standard Oil Co.*, 101 Pa. St. 149; *Evansville & T. H. R. R. Co. v. West*, 37 N. E. 1009; *Lake Shore & M. S. Ry. Co. v. People*, 46 Mich. 193. An assessment is a tax. *Nichols v. Bridgeport*, 23

Conn. 189 (60 Am. Dec. 636); *Zottman v. San Francisco*, 20 Cal. 91 (81 Am. Dec. 96). "A municipal by-law cannot require interest on an assessment, unless authorized by statute." *Sargent v. Tuttle*, 67 Conn. 162 (32 L. R. A. 822); *Haskell v. Bartlett*, 34 Cal. 283; *Tuttle v. Polk*, 50 N. W. 38.

Kerr & McCord, for respondent:

In this state it is settled law that the obligations of a municipal corporation draw interest from the date of their presentment. *Seymour v. Spokane*, 6 Wash. 364; *Union Savings Bank v. Gelbach*, 8 Wash. 497; *State ex rel. Theis v. Bowen*, 11 Wash. 432.

Counsel in his brief insists that the city is powerless at this time to collect interest from the property holders; was that any fault of the contractors? Had the city performed its duties in the first instance it would have been entitled to collect interest from the property holders on the 9th day of June, 1891, the date of the delinquency of the original assessment. This is certainly, under the record, a case in which the city, whose duty it is to collect this interest, has exhausted its power to do so; and, as we understand it, this is still an open question in this state as to whether the city is liable to the warrant holder, when it has exhausted its power of paying the warrant out of funds collected from the abutting property. The following cases seem to us to clearly sustain the liability of a city, when by negligence of its officers it has exhausted all power to make good a special fund from a special assessment: *Barber Asphalt Co. v. Harrisburg*, 64 Fed. 283 (29 L. R. A. 401); *Hussey v. Sibley*, 66 Mo. 192 (22 Am. Rep. 557); *Fisher v. St. Louis*, 44 Mo. 482; *Louisville v. Hyatt*, 5 B. Mon. 200; *German-American Savings Bank v. Spokane*, 17 Wash. 315 (38 L. R. A. 259).

The opinion of the court was delivered by

GORDON, J.—Respondent instituted this proceeding in the superior court for Whatcom county to compel the appellants, the mayor and city council of the city of New Whatcom, and its treasurer, to pay the interest on a certain warrant drawn upon a special fund of the city created for the purpose of paying for certain street improvements. Appellants' demurrer to the alternative writ was overruled. Thereupon they answered, denying generally each and all of the allegations of the affidavit upon which the alternative writ issued, and by way of affirmative matter set out what purports to be a complete history of the warrant in question, and the circumstances attending its issue. The superior court sustained a demurrer to the affirmative matter contained in the answer, and proceeding to trial without a jury (a jury having been waived by the parties), thereafter entered judgment awarding a peremptory writ, and it is from that judgment that this appeal was taken.

There are no exceptions to any of the findings of fact and none of the evidence has been brought to this court, but it sufficiently appears from the record that in the year 1890 the former city of New Whatcom—and in this connection it is sufficient to say that the present city succeeded to all of its rights and also all of its burdens—ordered the improvement of Holly street from Forrest street to Harrison street in said city, and on the 16th day of August of that year a contract was entered into between said city and Rae & McDonald (respondent's assignors) for the work necessary to improve said street in accordance with the determination reached by the city and its authorities. Such contract contained the following clause:

“And it is further agreed by the parties of the second part (Rae & McDonald) that they will accept the warrants of the said city of New Whatcom at their face value, said

warrants to become due and payable by the city treasurer when the taxes assessed and levied for said improvement shall have been paid into the city treasury in full for all sums to become due on this contract. . . . Said warrants . . . shall draw interest at the rate of ten per cent. per annum from the 7th day of October, 1890, until paid or called in for payment by the treasurer of said city."

It appears that the work was fully completed in accordance with the terms of said contract, and in September, 1890, the following, among other warrants, was issued to the contractors, to-wit:

" No. 122.

" \$1,179.00.

CITY WARRANT.

" Fund for the Improvement of Holly Street from Forrest Street to Harrison Street.

" New Whatcom, Washington, Sept. —, 1890.

" The Treasurer of the City of New Whatcom:

" Will pay to the order of Rae & McDonald eleven hundred and seventy-nine dollars from moneys of the above named fund not otherwise appropriated, payment of the approximate estimate on the street above named.

" This warrant when presented to the city treasurer for payment and by him endorsed ' not paid for want of funds ' shall draw interest at the rate of ten per cent. per annum from the date of such endorsement until paid or called in for payment; provided that in no case shall this warrant begin bearing interest previous to the 6th day of October, A. D. 1890. (Signed.) " E. Cosgrove, Mayor.

" Medill Connell, Clerk."

(Seal.)

The city proceeded to levy an assessment upon lands fronting and abutting on said street improvement for the purpose of paying the cost thereof. The assessment was completed some time in April, 1891, and became delinquent in June, 1891. In December, 1894, this court held the assessment void and unenforceable. *New Whatcom v. Bell-*

ingham Bay Imp. Co., 10 Wash. 378 (38 Pac. 1024). In the following spring the city proceeded to cause a re-assessment to be made in accordance with the laws (Laws 1893, pp. 226-231; Bal. Code, §§ 1139-1149) and ordinances governing said city, which re-assessment was in an amount equal to the cost of the improvement and to the face amount of all of the warrants drawn against such special fund, not including therein any interest. This re-assessment became delinquent April 26, 1896. It appears that the city has paid to respondent on account of the warrant in question the face thereof and interest at the legal rate, viz., seven per cent. from April 26, 1896, but has refused to pay any further sum thereon. It is urged on behalf of appellants that the improvement was originally ordered by a resolution passed at an adjourned meeting of the city council, which resolution was never published, and it is contended that the city was without power to proceed in that manner. We do not find it necessary to determine that question, in view of the finding of the trial court that the improvement was made "pursuant to the ordinances and resolutions of said city," which finding was not excepted to and is conclusive. It is also urged that the city was without power to enforce the collection of interest against the abutting property prior to the date of the delinquency of the re-assessment, and for that reason the respondent is not entitled to collect it from the city. This is the principal question to which the argument of the appellants is addressed. At the time of filing the briefs in this cause that question had not been decided by this court, but in the recent case of *Northwestern & Pacific Hypotheek Bank v. Spokane*, 18 Wash. 456 (51 Pac. 1070), we held that in a proceeding to re-assess it was proper to include interest as contemplated in § 6 of the laws of 1893, p. 229 (Bal. Code, § 1144), and the re-assessment proceeding in the Spokane case, which included such in-

terest, was upheld by this court. It was our view that the statute, viz.:

“ . . . such new assessment shall be for an amount which shall not exceed the actual cost and value of the improvement, *together with any interest that shall have lawfully accrued thereon,*”

did not admit of any other conclusion. Following the decision in that case, the contention of the appellants cannot prevail.

Only one other question needs consideration. It is whether the failure of the city authorities to include interest in the re-assessment renders the city liable for the payment of such interest. This is not a proceeding to compel payment from the general fund and it appears that there is sufficient in the special fund upon which this warrant is drawn to pay the full amount called for by the warrant itself. It is conceded that the warrant here in question is the oldest outstanding warrant on said fund remaining unpaid, but it is also shown that no interest whatever has been collected and that the whole amount assessed, when fully paid, will only equal the face of the warrants drawn upon this special fund, so that if any interest whatever is required to be paid the fund will be exhausted and nothing remain for the payment of either principal or interest upon some of the outstanding warrants upon this fund. It therefore becomes necessary to determine the question of the liability of the city for the interest stipulated in these warrants. We think that it must be held that the city is liable. The statute of 1893 authorizing the re-assessment evidently contemplates that but one re-assessment can be made. In this case the proceedings to re-assess were valid, and it is apparent that the power to proceed against the abutting property has been exhausted. Had the authorities of the city declined to take steps to re-assess (the first assessment having

been adjudged void) respondent could have compelled such re-assessment by mandamus. *State ex rel. Hemen v. Ballard*, 16 Wash. 418 (47 Pac. 970). But instead of declining to institute proceedings for re-assessment, the city authorities proceeded with commendable promptness, thereby affording respondent no cause for complaint, and, having undertaken to re-assess, respondent might well have presumed that it would do its full duty in the premises, and make such re-assessment for a sum sufficient to meet the full obligation of its contract. And we are unable to see how any ground was afforded the respondent for interference by mandamus. It had no right to assume that the authorities would neglect to make an ample assessment. Indeed, the presumptions were all the other way. The city owed a duty to the respondent and the law clothed it with ample power to enable that duty to be fully discharged. Proceedings were regularly and seasonably instituted looking thereto and the presumption of regularity which always attaches to the acts of officers and others charged with the performance of a legal duty was that nothing would be left undone which of right should be done in order to discharge the whole duty. No appreciable time intervened, after the purpose of the city authorities to make the assessment for an insufficient sum became manifest, before the completion of the proceeding. So far as the record advises us, the ordinance was introduced and passed at one session, and, when complete, the power to re-assess was exhausted. The facts and circumstances of the case at bar do not bring it within the rule announced by this court in *German-American Savings Bank v. Spokane*, 17 Wash. 315 (49 Pac. 542), and it seems to be conceded by counsel that the decision of this question is not controlled by that case. It would be novel doctrine to visit the consequences of laches and neglect upon one who has been guilty of neither, and, as already said,

Apr. 1898.] Opinion of the Court—SCOTT, C. J.

we are unable to see how the respondent in the present case would have had any standing had he instituted or attempted to institute a mandamus proceeding at any time prior to final action by the city authorities.

We think the judgment of the superior court was right and it is affirmed.

ANDERS and DUNBAR, JJ., concur.

[No. 2773. Decided April 12, 1898.]

ISAAC C. KIGGINS, *Appellant*, v. CHARLES F. MUNDAY,
THE GUARANTY LOAN AND TRUST COMPANY *et al.*,
Respondents.

BANKS AND BANKING—LIABILITY OF STOCKHOLDERS.

When a corporation, which is authorized under the laws of this state to engage in banking and also in other distinct lines of corporate business, becomes insolvent, corporate assets, realized from the collection from stockholders of sums due under their statutory liability as shareholders in a banking corporation, should be applied in satisfaction of claims against the corporation arising out of its transaction of banking business, to the exclusion of other creditors.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

George A. Hurd, for appellant.

White, Munday & Fulton, Strudwick & Peters, and Corliss, Langland & McKay, for respondents.

The opinion of the court was delivered by

SCOTT, C. J.—The Guarantee Loan & Trust Company was incorporated to engage in the following lines of business, as stated in its articles of incorporation:

“First, to loan money on real or personal security, and to sell or otherwise negotiate such loans; second, to buy, sell, negotiate and guaranty the payment of notes, bonds, mortgages, bills of exchange, and other evidences of indebtedness; third, to make, execute, and deliver its bonds or other obligations in writing; fourth, to engage in and carry on the business of banking to such an extent, and in all such branches, as may legally be done under the laws of Washington territory; fifth, to purchase, sell, mortgage and convey real and personal property; sixth, to accept and execute all trusts, fiduciary and otherwise; seventh, to do any and all things necessary, proper, or convenient for carrying out the objects and accomplishing the purpose for which the corporation is formed.”

After it had continued in business for several years, suit was begun by a creditor, alleging its insolvency, and praying for the enforcement and collection of the statutory liability against the stockholders of the corporation, and for the appointment of a receiver, etc. The court has not found it necessary to pass on some of the questions argued, and the following is a sufficient statement to present the matter decided: A receiver was appointed, and he filed a report and petition setting forth the condition of the corporation, and stating therein that there were two classes of creditors of the corporation, viz., the obligations arising out of transactions ordinarily incident to a banking business, including deposits, general ledger accounts, rediscounts of bills payable due the bank, etc.; and the second class was given as those arising by virtue of guaranties of mortgages negotiated. He set forth that he had in his possession the sum of \$500, which had been paid in to him by one of the stockholders on account of his statutory liability on the stock held by him, and that, unless otherwise directed by the court, he would apply this sum on the claims mentioned as belonging to the first class, to the exclusion of claims given as belonging to the second class. Thereafter the Pullman Loan &

Apr. 1898.] Opinion of the Court—Scott, C. J.

Savings Bank, of Pullman, Illinois, filed its petition praying that the sum so held by the receiver be distributed ratably to the creditors of the first class exclusively; and the appellant and others, who were holders of mortgage claims guaranteed by the defendant corporation, filed petitions praying that said sum should be ordered distributed ratably among all the creditors of the corporation, and that they be entitled to share equally in all its assets. The court held that the amounts collected from the stockholders on account of their statutory liability should be applied exclusively upon the claims belonging to the first class, and this appeal was taken.

Section 11, art. 12, of the constitution is as follows:

“No corporation, association, or individual shall issue or put in circulation as money anything but the lawful money of the United States. Each stockholder of any banking or insurance corporation or joint-stock association shall be individually and personally liable equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation or association accruing, while they remain such stockholders, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares.”

Section 1511, 1 Hill's Code (Bal. Code, § 4266), contains the following:

“ . . . Provided, that the stockholders of every bank incorporated under this act or the territory of Washington shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association accruing while they remain such stockholders, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares.”

There is no other provision, called to our attention, bearing upon the question as to whether these sections apply to the banking business only, where a private corporation is

formed for that and other purposes, and it is a matter of intention as to the provisions given, to be determined by recognized rules of interpretation. Under our laws a private corporation may be formed to engage in several distinct kinds or lines of business. As respondent says, one may be incorporated to engage in both a banking and a manufacturing business; and some of the cases from states where, under their laws, corporations formed to do a banking business must be formed for that exclusively, do not apply. Obtaining, negotiating, and guarantying mortgage loans is not a banking business. *Oregon, etc., Investment Co. v. Rathbun*, 5 Sawy. 32; *Selden v. Equitable Trust Co.*, 94 U. S. 419. A corporation might be created for that purpose only, without there being the additional statutory liability against the shareholders, the same as it might be formed for manufacturing purposes.

"A bank is an institution for the custody and loan of money, the exchange and transmission of the same by means of bills and drafts, and the issuance of its own promissory notes, payable to bearer, as currency; or for the exercise of one or more of these functions." 3 Am. & Eng. Enc. Law (2d ed.) 789. See, also, Boone, Banking, §§ 2, 3.

Such definition does not include the guarantying of a mortgage loan such as these here in controversy. In cases of liabilities arising from such transactions, recourse could be had to the corporate assets, but the additional statutory liability is no part of the corporate property or assets. The inquiry is a pertinent one, as to whether there was any intention to provide a greater liability or greater security for the same acts or business where performed by a corporation organized for that purpose, and also for banking purposes, than would obtain if it were organized to perform the particular business only. It would seem not. There is no reason for such a distinction between the same

Apr. 1898.] Opinion of the Court—SCOTT, C. J.

kinds of creditors. It would not ordinarily be difficult to distinguish between its business and acts as a bank, and other obligations it might assume, and business it might pursue either generally or in special instances. It is urged in this case, as a reason why there should be no distinction recognized between the creditors, that the bank never kept any separate system of accounts relating to the various branches of its business; but the method of keeping accounts could not affect the character of the claims, nor enlarge the obligations of the shareholders. It could only render it more difficult to segregate the various claims, but that difficulty has been overcome in this case. It would seem as though a reasonable interpretation of the sections in question is that it was intended to require state banks to give the same security only to their creditors in their banking business as is given for the same business in the case of national banks; and although a state bank might incorporate to, or might, transact other business, aside from banking business, that a national bank could not engage in, it was not intended to impose an additional liability upon the shareholders for such other business. We are of the opinion that the judgment of the lower court was right.

Affirmed.

GORDON, DUNBAR, ANDERS and REAVIS, JJ., concur.

[No. 2886. Decided April 14, 1898.]

THE STATE OF WASHINGTON, v. A. P. TUGWELL AND
F. R. BAKER.

CONTEMPT OF COURT—WHAT CONSTITUTES—PENDENCY OF ACTIONS.

The constitutional guaranty that "every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right," does not grant immunity from the jurisdiction and process of courts in proceedings for contempt against those publishing articles reflecting on the court or judges thereof pending the trial of a case.

Under the inherent power vested in courts by the common law respecting the punishment of contempts and under the authority of Bal. Code, § 5798, providing that "disorderly, contemptuous, or insolent behavior toward the judge while holding court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings," shall be deemed a contempt of court, the publication in a newspaper, while a cause is pending on appeal before the supreme court, of an article reflecting on the integrity of the court, or of one of the judges thereof, and which tends to embarrass and disturb the conclusion of the court in the determination of the cause pending before it, is such conduct as to warrant the court's proceeding against the offender by attachment for contempt.

A cause on appeal to the supreme court of this state remains pending, and within the jurisdiction of the court to make any modification of its decision, until the final judgment has been rendered and the remittitur issued thereon.

Original Proceeding for Contempt.

P. H. Winston, Attorney General, *T. M. Vance*, Assistant Attorney General, and *A. R. Titlow*, for The State.

Richard Winsor, and *John C. Stallcup*, for defendants.

Per Curiam: On the 3d of March, 1898, the attorney general filed an information against, and moved for a rule upon, the defendants, to show cause why an attachment should not issue against them for contempt of court in re-

Apr. 1898.]

Opinion Per Curiam.

spect to the publication on the 24th of February, 1898, in a certain weekly newspaper in the city of Tacoma known as the Tacoma Sun, of the following article, to-wit:

“ The supreme court of this state has again eased its conscience, if it ever had any to ease, by its infernal rotten decision in the Tacoma warrant case. . . . (naming a member of the court) can now sit snugly up alongside some other supreme simpletons and suck the hind teat of plutocracy. It is said that he changed his mind. Suffering saints, who ever made a charge that he had a mind to change? It is true he voted the other way when the case was up before, but nobody ever accused him of having a mind, and even if they did, after reading the decision in the warrant case referred to, which he is supposed to have written, they would know that the accusation had no foundation and could not be substantiated. This decision is only remarkable for its malignant, dishonest and damnable distortions of, not only the law, but also the facts. It states the facts shockingly contrary to the truth, as shown by the record in the case, as will be seen by the dissenting opinion that will soon be filed. It is the conception of an ass, a lean-witted, anile leripoop, who no doubt thinks he would rather be rich than be right. We speak of . . . more particularly because he flopped. What made him flop, he knows best, but every one else has a good idea. There is only one thing about . . . that pleases me, and that is his term soon ends, and he will be relegated to that everlasting oblivion that awaits all of these last rotten articles of republicanism. How long, O Merciful Creator of the Universe, are we to still suffer for the misdeeds of dishonest, corrupt and disreputable public servants? The people of Tacoma have lived in a wild and reckless revel of republican rule. They have drunk deep from the foul cup that folly has filled with perfumed poison and held to trusting lips, while the sweet sensuous song sung by satan’s sirens, lulled the senses to fancied rest, security and safety as they plunged headlong into the frightful chasm of debt, at the bottom of which they will find destitution, destruction, dishonor and death. While yet money can be raised,

our citizens ought to erect a monument in memory of the past, to stand as a solemn warning for the future. The pedestal or base should be of busted banks, six stalwart representatives of republicanism, such, say, as Boggs and McCauley, Hedges and Holmes, Shane and McKane, should stand shoulder to shoulder with hands clasped and eyes raised with a look of envious emulation at the central figure yet above them all. And that figure should be . . . , on the top of a long shaft straddling the American eagle, in one hand a bunch of illegal warrants and in the other a double-barreled horse pistol as he commands fair Tacoma to kneel down and take one more dose of the vile, nauseating stuff, distillations of republican rottenness, that this supreme court has fixed up for us; then circling around all we would have the republican council dancing like diabolical demons trying to put out a huge bonfire made from the wreck and ruin of a light plant the city once owned, with imaginary water from a water plant for which the city paid more than a million real dollars. If all this could be placed in the public park where good pious people could go when the weather was nice and warm, and sit on the benches amidst the perfume of sweet flowers, with a picture of Grattan H. Wheeler in one hand and Walter J. Thompson in the other, oh, what a flood of tender memories would float over the soul! Oh, what a history, pages without printing, volumes without words. But Tacoma will never down, she will fight for justice till the last dishonest damn rascal that drags his slimy carcass across the road to justice shall have been fed to the crows. Men who have forgotten more law than . . . and his stud of supercilious asses ever knew, have studied this warrant question for months, and years; and they say the warrants have been paid; that they are dead and should not be paid again. This is only a touch of the tail end of republican prosperity of the past; but let us go on to the future. The day fast comes when the stains of disgrace and dishonor, those perfidious and pusillanimous tools of the trusts, have placed upon the fair name and fame of Washington, will be wiped out forever. We must fight the ground inch by inch until honest men, who see no

Apr. 1898.]

Opinion Per Curiam.

Klondike in the bench, shall be elected. Men who have the people's interests at heart, as well as the interest of the bondholder and warrant shark. This state will rise in its wrath and when fall comes, vicious, vacillating . . . will be swept into oblivion forever."

The information charged that the defendant Tugwell was editor and Baker was associate editor of the newspaper and that such publication was made of and concerning the cause of W. C. Bardsley, plaintiff, v. W. A. Sternberg, treasurer of the city of Tacoma, defendant, then pending in this court. The rule to show cause was issued and the defendants appeared and answered to the information. They admitted that on the 24th of February, 1898, defendant Tugwell was editor and defendant Baker, associate editor, of the weekly newspaper known as the Tacoma Sun, published in the city of Tacoma, and that they published the article set forth in the information. They denied that on the 24th day of February, 1898, or at any time thereafter there was still pending in this court the cause of *Bardsley v. Sternberg*; denied that by the publication of the article stated in the information they were guilty of any act or omission towards the court defined and deemed by the laws of the state to be a contempt of court; alleged that under the facts stated and under the laws and constitution of the state they had a right to publish the facts and comments as they appear in the article set out in the information; denied that they were amenable to the court for the publication; denied the right or power of the court to call upon them to answer as in these proceedings required, and denied that the publication amounted to a contempt. The attorney general thereupon demurred to the answer on the ground that it set up no defense and stated no reason why attachment should not issue against defendants. The facts relative to the pendency of the cause

of *Bardsley v. Sternberg* were of record in this court when the case was argued. The cause of *Bardsley v. Sternberg* was argued and submitted at the May session, 1897. On June 22, 1897, an opinion was filed by this court affirming the judgment of the superior court in such cause, two of the judges at that time dissenting from the opinion then filed. On July 20, 1897, counsel for the appellant Bardsley duly filed a petition for rehearing, and a rehearing thereafter was granted and the cause re-argued in this court. On February 18, 1898, the opinion of the court was filed reversing the judgment of the superior court. On February 24, 1898, a dissenting opinion in which two of the judges joined was filed. On February 28, 1898, a petition for a modification of the opinion of the majority of the court filed on the 18th day of February was filed in this court by Messrs. John P. Judson, John C. Stallcup and B. F. Heuston, attorneys for respondent, and on March 2, 1898, a majority opinion of the court was filed denying the last petition for modification of the opinion of reversal, and final judgment entered in the cause on the 2d day of March, 1898, and on March 9, 1898, the remittitur issued.

Art. 1, § 5, of the constitution of Washington, contained in the bill of rights, is as follows:

“Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.”

The statute of the state defining contempts, § 5798, Bal. Code (2 Hill's Code, § 778), is as follows:

“The following acts or omissions, in respect to a court of justice or proceedings therein, are deemed to be contempts of court:

“1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;

Apr. 1898.]

Opinion Per Curiam.

"2. A breach of the peace, boisterous conduct, or violent disturbance tending to interrupt the due course of a trial or other judicial proceeding;

"3. Misbehavior in office, or other wilful neglect or violation of duty by an attorney, clerk, sheriff, or other person appointed or selected to perform a judicial or ministerial service;

"4. Deceit, abuse of the process, or proceedings of the court by a party to an action, suit, or special proceeding;

"5. Disobedience of any lawful judgment, decree, order, or process of the court;

"6. Assuming to be an attorney or other officer of the court, and acting as such without authority in a particular instance;

"7. Rescuing any person or property in the lawful custody of an officer, held by such officer under an order or process of such court;

"8. Unlawfully detaining a witness or party to an action, suit, or proceeding while going to, remaining at, or returning from the court where the same is for trial;

"9. Any other unlawful interference with the process or proceedings of a court;

"10. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness;

"11. When summoned as a juror in a court, improperly conversing with a party to an action, suit, or proceeding to be tried at such court, or with any other person in relation to the merits of such action, suit, or proceeding, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court;

"12. Disobedience by an inferior tribunal, magistrate, or officer of the lawful judgment, decree, order, or process of a superior court, or proceeding in an action, suit, or proceeding contrary to law, after such action, suit, or proceeding, shall have been removed from the jurisdiction of such inferior tribunal, magistrate or officer."

Sec. 5809 of the same code (2 Hill's Code, §789) is as follows:

"Persons proceeded against according to the provisions of this chapter are also liable to indictment [or informa-

tion] for the same misconduct, if it be an indictable offense, but the court before which a conviction is had on the indictment [or information] in passing sentence shall take into consideration the punishment before inflicted."

1. On the 25th day of February, 1898, a formal communication was received by the court from a reputable member of the bar of the city of Seattle enclosing a copy of the newspaper containing the publication set out in the information and praying its consideration by the court, and on the same day the newspaper containing the publication was delivered by mail to several members of the court. The communication and subject matter thereof were then submitted to the attorney general by the court, and he thereupon filed the information. The principal question raised by the answer of the defendants and argued by their counsel is that under the facts above stated defendants had a right to publish the facts and comments in the publication set forth in the information. It is also maintained by the learned counsel for defendants that art. 1, § 5, of the constitution of Washington guarantees to defendants, as charged, immunity from the jurisdiction and process in the nature of contempt of any court or judicial tribunal of any character whatever. In support of their contention counsel for defendants have cited authorities from the courts of some of the other states. The case of *Dunham v. State*, 6 Iowa, 245, decided in 1858, was an appeal, from a conviction of contempt in the district court, of the editor of a newspaper for publication of matter deemed offensive to the court. The Iowa statute, which was construed, defined a contempt as "contemptuous or insolent behavior toward the court, while engaged in the discharge of a judicial duty, which may tend to impair the respect due to its authority." The court said, after stating the acts of the respondent:

" . . . It will be observed, that, except in relation to his comments, and the publication made of the proceedings

Apr. 1898.]

Opinion Per Curiam.

in his own case, on the first hearing, his articles had reference entirely to cases that were not before the court," and as

" . . . there was no rule, general or special, prohibiting the publication of the speeches of counsel, remarks of the court, or giving a statement of the proceedings,"

it did not, under the circumstances, amount to a contempt. The court also observed:

" We are strongly inclined to think, however, that the provisions of the code upon this subject, must be regarded as a limitation upon the power of the courts, to punish for any other contempts. We can conceive of no possible state of case, in which the exercise of this power might become necessary for the protection of the court, or the due administration of the law, that is not covered by these provisions. If such a case should, by possibility arise, we would not say that, by virtue of its inherent power, the punishment might not be inflicted."

It will be observed in this case that the gravamen of the publication made by the defendant was criticism and severe denunciation of the district judge for rulings in two cases which were finally concluded before the publication was made, and the court does not seem to regard the publication of proceedings occurring in a contempt proceeding against the defendant as falling within the statute, in the absence of a rule of the court forbidding the publication of such proceedings while still pending. In 1875 in the case of *State, v. Anderson*, 40 Iowa, 207, cited by counsel, the court referring to *Dunham v. State*, *supra*, said:

" In that case it was held, that the publication of articles in a newspaper, reflecting upon the conduct of a judge in relation to a cause pending in court, which had been disposed of before the publication, however unjust and libelous the publication may be, did not amount to contemptuous or violent behavior towards the court," under the stat-

ute, "nor that such articles were so calculated to impede, embarrass, or obstruct the court in the administration of the law as to justify the summary punishment of the offender," under the statute.

And in the case in hand the court said:

"The proceedings in the cause had been brought to a close, and what was said in the published article could in no manner influence the rulings of the court. The publication was not contemptuous or insolent behavior towards the court 'while engaged in the discharge of a judicial duty,' tending to impair the respect due to its authority."

And the court expressly concludes with this declaration:

"Whether, in case the article in question had been published while the court was engaged in the trial, or before the termination, of the cause in which the rulings of the court are criticised, it would have been sufficient to justify the court in punishing the author for contempt, we do not decide, for the reason that such state of case is not before us on the record."

It may be observed that these two cases do not decide whether, in Iowa, the court may punish contempts other than specified in the statute, nor whether the court would deem a publication tending to embarrass or influence the court in a pending cause a contempt, and therefore do not aid the court to any considerable extent in the case at bar. The case of *Storey v. People*, 79 Ill. 45 (22 Am. Rep. 158), was where a publication in a newspaper censured the action of the grand jury, questioned its integrity as a body and indirectly attacked the moral character of certain of its members; but the publication was made after the grand jury had acted upon, and returned, three indictments against defendant which had already been filed in the court, and at the time of the publication of the record there were no complaints pending before the grand jury of any kind against the defendant. The court said:

Apr. 1898.]

Opinion Per Curiam.

"The only question, therefore, is, assuming the articles to be libelous, whether the publishing of a libel on a grand jury, or on any of the members thereof, because of an act already done, may be summarily punished as a contempt.

"We do not understand the articles as having a tendency directly to impede, embarrass or obstruct the grand jury in the discharge of any of its duties remaining to be discharged after the publications were made. No allusion is made to any matter upon which the members were thereafter to act, and there could, therefore, of necessity, be no attempt to interfere with the exercise of their free and unbiased judgments as to such matters."

And the court, referring to the case of *People v. Wilson*, 64 Ill. 195 (16 Am. Rep. 528), defined precisely what was considered and adjudged in that case,

"that the cause in reference to which the article was published was *then pending* before the court, undecided, and that the article was *calculated* to, and was *designed* to influence the members of the court in deciding it."

And further observes that

"since the decision of that case the statutes have been revised, and the provision in regard to contempts, before quoted, has been repealed, leaving no statute in force on that subject, except in regard to the enforcement of decrees in chancery, and the punishment of certain specific offenses, such as the failure of jurors to attend in obedience to summons, the failure of officers to make service and return of writs, etc.,"

but observes:

"Courts, however, possess certain common law powers, subject to modifications that may have been imposed by our constitution and statutes, among which is included that of punishing for contempts."

The case of *Galland v. Galland*, 44 Cal. 475 (13 Am. Rep. 167), was one of contempt in a court of equity by a husband for not paying a monthly sum for his wife's sup-

port, which he had been adjudged to pay, and on appeal the supreme court merely decided that the defendant might purge himself from the contempt by showing that he was unable to pay it and that the inability had not been created by his own act. We presume the case was cited because of the following language of the opinion:

"In this state the power of courts to punish for contempt has been regulated by statute. . . . This is a limitation upon the power formerly exercised by courts to punish for contempt; but whether courts in this state can exercise power in this respect in cases not named in the statute, or otherwise than it has provided, we are not called upon in this case to consider. In our opinion, however, where one is called before a court to answer for contempt for not doing an act which he has been adjudged to do, inquiry may properly be had as to whether it is still in his power to do it, and if it be not, he should not be adjudged guilty . . ."

We cannot perceive that the case is in point. The case of *Johnson v. Superior Court*, 63 Cal. 578, arose upon the refusal of the court to allow process to a defendant in a divorce suit on the ground that he had not obeyed the order of the court requiring him to pay plaintiff her costs and counsel fees. The California Code contained this provision:

"No statute, law or rule is continued in force because it is consistent with the provisions of this Code on the same subject; but in all cases provided for by this code, all statutes, laws and rules heretofore in force in this state, whether consistent or not with the provisions of this code, unless expressly continued in force by it, are repealed and abrogated."

The discussion in this case was upon the *quantum* and manner of the punishment that could be pronounced by the court for a disobedience of its order upon the defendant, and the court held that, the statute having prescribed the

Apr. 1898.]

Opinion Per Curiam.

punishment, such provision was controlling. Counsel for defendants seem to rely more particularly upon the case of *State v. Kaiser*, 20 Ore. 50 (23 Pac. 964). This, again, was a punishment by the district court of a publisher of a newspaper for a libelous publication concerning the judge of the court. The code of Oregon is identical with ours. The court observes:

“The inherent power of a court of justice to punish parties for contempt who commit acts which have a direct tendency to obstruct or embarrass its proceedings in matters pending before it, or to influence decisions regarding such matters, is undoubted; but it can hardly be maintained, from the adjudications had upon the subject in the various states, that such power is broad enough to vest in the court the authority to so punish any one for criticising the court on account of its procedure in matters which have fully terminated, however much its dignity and standing may be affected thereby, . . . In any event, it seems to me that the legislature has authority to limit the power of courts in regard to matters of contempt to the punishment only of such acts as are specified in the sections of the code above set out. . . .

“The publication, according to the general definition given by Blackstone, and by some of the more modern law-writers, upon the subject, would probably constitute contempt, but, under the code of this state, it does not; nor do I think it would according to the weight of decisions made under the constitutions of the various states. If it had reflected upon the conduct of the court with reference to a *pending suit, and tended in any manner to influence its decision therein*, it would, unquestionably, have been a contempt; but it was not shown that any suit was then pending by which the rights of any litigant were, or could have been, affected by it.”

It will be observed the supreme court of Oregon, upon a statute identical with ours, holds that a publication tending to embarrass or influence the action of the court in a cause pending before it is contempt. All the cases cited by coun-

sel for the defendants have thus been examined, and in them does not seem to be found any substantial support of the principle of constitutional construction invoked here by them.

2. The constitutional liberty of speech and the press and the guaranties against its abridgment are found in the laws of all the American states, and the federal constitution, and undoubtedly primarily grew out of the censorship of articles intended for publication by public authority. Such a censorship was inconsistent with free institutions and with that free discussion of all public officers and agents required for the intelligent exercise of the right of suffrage, and thus the common law of libel was almost universally revised by statute so that the truth of the publication could be given in evidence as defense. The arbitrary rule existing in England before the American revolution was thus abrogated in this country. Parliament had assumed an extensive power to punish for contempt, as had likewise the English courts of common law. Under the rule frequently enforced by the English courts of that period, any criticism upon a judicial officer made at any time after the determination of the cause, of an offensive character, was deemed a contempt of court and thus the rule was dangerous to public and individual liberty. This rule, however, has long since been abrogated in England, and the law of contempt there may be said to be now similar to that announced by the great number of the American courts. Judge Cooley, on Constitutional Limitations (5th ed.), p. 521, says:

“The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing,

Apr. 1898.]

Opinion Per Curiam.

reputation, or pecuniary interests of individuals. Or, to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted."

And the same eminent jurist and commentator on constitutional law further says, at another place:

"It has also been held in many cases that the publication of an article in a newspaper commenting on proceedings in court then pending and undetermined, or upon the court in its relation thereto, made at a time and under circumstances calculated to affect the course of justice in such proceedings, and obviously intended for that purpose, may be punished as a contempt, even though the court was not in session when the publication was made."

And Mr. Bishop, a leading commentator on American criminal law, says:

"By the commonly accepted doctrine, any publication whether by parties or strangers relating to a cause in court, tending to prejudice the public as to its merits, and to corrupt or embarrass the administration of justice—or reflecting on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel—may be visited as a contempt." 2 Bishop, New Criminal Law, § 259.

The learned editor of American Decisions, Mr. Freeman, in notes upon the *Case of Sturoc*, 97 Am. Dec. 630, states the rule from all the authorities:

"It has long been settled, and is now generally acknowledged, that certain publications in newspapers may amount to contempts of court, and may be summarily punished as such. Publications pending a suit, reflecting upon the court, the jury, the parties, the officers of the court, or the

attorneys, with reference to the suit, and having a tendency to influence the action of the tribunal before which the case is pending, is a contempt of that court, which may be summarily punished by attachment." 2 Story, Constitution, §§ 1774, 1884; *Ex parte Bollman*, 4 Cranch, 75; *Ex parte Kearney*, 7 Wheat. 38; *Anderson v. Dunn*, 6 Wheat. 204; *Ex parte Bergman*, 3 Wyo. 395 (26 Pac. 914); *Savin's Case*, 131 U. S. 267 (9 Sup. Ct. 699).

Rapalje, a careful authority on Contempt, says (p. 70, § 56), with reference to publications reflecting on the court or its proceedings:

"Any publication, pending a suit, reflecting on the court, the parties to the suit, the witnesses, the jurors or the counsel, is a contempt of court."

The common law was adopted at the organization of Washington Territory by the first legislative assembly. The state legislature enacted (Laws 1891, p. 31; Bal. Code, § 4783):

"The common law, so far as it is not inconsistent with the constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state."

The law of contempt as enacted by the legislature of this state and hereinbefore set out is declaratory of the common law of contempt as construed by the great majority of the American courts. This was the view held by the supreme court of Oregon in *State v. Kaiser*, *supra*, in construing the same statute. Chief Justice THAYER, in that case delivering the opinion of the court, said:

"As I view the said sections of the Code, they are little more than declaratory of the law upon the subject of contempt as understood by a large proportion of the courts of the several states at the time of their adoption."

Apr. 1898.]

Opinion Per Curiam.

And the various adjudications of the American courts referred to have all had in view similar constitutional guaranties of freedom of speech and press as found in our state constitution. The publisher of the article may be responsible in a civil or criminal action for libel, but if the article is calculated to embarrass or influence a court or prevent a fair trial between suitors in court either by disturbing the independent verdict of the jury or the independent and unbiased conclusion of the court, it is contempt, and a judge of the court cannot in any action of libel, however it may reflect upon him personally, recover damages for such contempt. It is not a personal wrong and does not affect the judge personally, but it is such an offence, as has been observed, as alone affects the court and the administration of justice, and the common law and statute affirmatory thereof vest the punishment of such contempt in the court. The legislature of this state has specified punishment for contempts and has adopted the common law relating to them. The rights of suitors in courts and of persons charged with offences to a fair trial is guaranteed by our fundamental law. This is a sacred right of very ancient origin. It was the cause and is the only reason for the existence of the judiciary as a co-ordinate department of the sovereignty of the state. It is this right of impartial trial which is violated by the publication and submission of an article to the court, while a cause is pending and yet undetermined, tending to embarrass or influence the court in its final conclusion; and the individual liberty of the citizen is gone when his personal rights are endangered, or lost by such extraneous influences. It is this protection of the rights of suitors in a judicial action which compels the courts to exercise their jurisdiction of contempt. It is sometimes a delicate power for the court to exercise. It will ordinarily much more readily exercise its power to punish such contempts,

when the offensive acts have been directed toward the improper control or influence of a jury or witness or some officer of the court, for the reason that when such acts are directed toward a court there is always something of the appearance of the personality of the court involved. As observed by the supreme court of Illinois in *People v. Wilson*, 64 Ill. 214:

“The respondents are correct in saying in their answers that they have a right to examine the proceedings of any and every department of the government.

“Far be it from us to deny that right. Such freedom of the press is indispensable to the preservation of the freedom of the people. But certainly neither these respondents nor any intelligent person connected with the press, and having a just idea of its responsibilities as well as its powers, will claim that it may seek to control the administration of justice or influence the decision of pending causes.

“A court will, of course, endeavor to remain wholly uninfluenced by publications like that under consideration, but will the community believe that it is able to do so? Can it even be certain in regard to itself? Can men always be sure of their mental poise? A timid man might be influenced to yield, while a combative man would be driven in the opposite direction. Whether the actual influence is on one side or the other, so far as it is felt at all, it becomes dangerous to the administration of justice. Even if a court is happily composed of judges of such firm and equal temper that they remain wholly uninfluenced in either direction, nevertheless a disturbing element has been thrown into the council chamber, which it is the wise policy of the law to exclude. . . .

“It may be said that, as long as the court was conscious it had not been frightened from its propriety by the article in question, the wiser course would have been to pass it by in silence.

“So far as we are personally concerned, we should have preferred to do so. . . . But a majority of the court were of the opinion that this publication could not be dis-

Apr. 1898.]

Opinion Per Curiam.

regarded without infidelity to our duty. By our relations to the bar, to the suitors in our court, to the entire judiciary of the state, and to the state itself, we felt constrained to call the persons responsible for this publication to account."

See, also, *State v. Faulds*, 17 Mont. 140 (42 Pac. 285); *In re Hughes*, 43 Pac. 692; *People v. Stapleton*, 18 Col. 568; (33 Pac. 167); *Cooper v. People*, 13 Colo. 337 (22 Pac. 790); *Commonwealth v. Dandridge*, 2 Va. Cas. 414; *State v. Frew*, 24 W. Va. 416 (49 Am. Rep. 257). The last case cited is an exhaustive and thorough compilation of the American authorities upon the subject of contempt. The judiciary of this state was created by, and its jurisdiction and the specifications of its judicial functions written in, the constitution. It receives its mandate from the sovereign people and it is responsible to them for the faithful discharge of its trust. Its sole authority from them is to declare the law of the state and by its process enforce that law; and it cannot make or revise any law. It can no more decline the exercise of rightful authority in the determination of a case presented to it than it can overstep its rightful authority in the assumption of arbitrary power. A timorous judiciary, shrinking from a rightful declaration of the law, is alike dangerous to civil rights and personal liberty with a corrupt and arbitrary one. As declared by the supreme court of Virginia in 2 Va. Cas. 414, from the standpoint of able jurists:

"They cannot but feel it a delicate and invidious task to define and decide upon the extent of their own powers, nor be ignorant, that the judgment they are called upon to render, may expose them on the one hand to the imputation of timidity and irresolution, or on the other, to that of usurpation and tyranny. The verity of these suspicions would not be more unworthy of the judges than the fact of their shrinking from this question, because of the consequences in which themselves might be involved by it.

. . . In this country, we know no privileges but such as exist for the public good. Many such privileges we have; from those which appertain to the legislature itself even down to such as belong to the lowest executive officer. Those, which surround the administration of justice, belong to the same order. Courts, their officers and process, are shielded from invasion and insult, not from any imaginary sanctity in the institutions themselves, or the persons of those who compose them (as in the political and ecclesiastical establishments of another hemisphere), but solely for the purpose of giving them their due weight and authority, and to enable those who administer them, to discharge their functions with impartiality, fidelity and effect. This is the true test of every privilege, not granted by statute, and is the spirit of every one (not merely private), which is so secured."

The court in the case at bar has concluded that the publication made by the defendants, if published while the case of *Bardsley v. Sternberg* was pending here, under the facts above stated is a contempt under the laws of this state. In such conclusion it is not intended to intimate or suggest that any citizen of the state has not a legal right to comment upon, criticise and freely and without restriction from any lawful authority discuss any cause determined by any of the courts of this state after the final disposition of such case; or that any restriction of fair and impartial reporting of cases pending in courts, unless forbidden by rule, is now imposed by our laws. The officers who compose the courts are selected by the people of the state for the discharge of their duties. The freest discussion of individual merits, capacity and character is necessary for an intelligent exercise of suffrage in the election of judges as of all other officers of the state. An action has been deemed pending in this court until the remittitur issued, but counsel have argued that although the statute does not determine when jurisdiction ends in this court, yet the court having been

Apr. 1898.]

Opinion Per Curiam.

authorized by statute to frame rules has by its rules determined the question of the conclusion of the case, and refers to Rule XIII:

"1. Every petition for rehearing must be filed within thirty days after the opinion shall have been rendered, and no more than one petition for a rehearing of the same question shall be filed; *Provided*, That the court may, in its discretion, allow any petition to be amended. The filing of a petition for rehearing shall suspend the decision of the court until a ruling thereon."

Elliott on Appellate Procedure says, § 558: "A second petition from the same party will not be considered." And that has been the practice in this court. The first opinion in the cause was followed by a petition for rehearing on the part of the appellant. Leave to print and file additional briefs was granted by the court and the case assigned regularly and reargued orally in the court, and the opinion of the majority of the court then filed, reversing the judgment of the superior court. A petition was then filed by counsel for respondent praying for an important modification of the opinion filed, and subsequently an opinion filed denying such modification. There can be no doubt of the jurisdiction of this court over the cause and the power to make any modification of its opinion, until the final judgment was rendered and until the remittitur issued. Under the law, the courts in this state are always in session, in legal contemplation.

"An action is 'pending' . . . until the judgment is fully certified." Anderson's Law Dictionary, Verb. Pend.

See *Ulshafer v. Stewart*, 71 Pa. St. 170; *Holland v. Fox*, 3 El. & Bl. (Q. B.) 977; *Wegman v. Childs*, 41 N. Y. 159; Hayne, New Trial, §§ 292, 293. From an inspection of the article set out in the information it

can readily be perceived that, thrust into the court before its final deliberation and final expression in the cause of *Bardsley v. Sternberg*, it comes within all the authorities as tending to embarrass and disturb the conclusion of the tribunal in the determination of the cause pending before it.

In determining the punishment that the judgment of the court will affix to the contempt in this case the court has taken into consideration that this is the first offence formally brought to its attention in the history of the state, and the maximum penalty affixed by the statute is reduced for that reason.

[No. 2729. Decided April 21, 1898.]

J. A. HOSHOR, *Appellant*, v. FANNIE B. KAUTZ *et al.*,
Respondents.

CONTRACTS — ILLEGALITY OF CONSIDERATION — BURDEN OF PROOF.

In an action upon a written contract based upon a valid consideration, to which there was interposed an affirmative defense that the contract was based upon an illegal consideration, the burden of proof is on defendants, and judgment in their favor is unwarranted when there is no other proof of the illegality of the consideration than such as is contained in plaintiff's original answers to interrogatories, and these answers at the time of trial had been explained and amended by the substitution of new answers showing the consideration to be the same as recited in the contract.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Reversed.

J. T. Ronald, John E. Humphries, W. E. Humphrey,
and *E. P. Edsen*, for appellant.

Josiah Collins, and *Hastings & Stedman*, for respondents.

Apr. 1898.] Opinion of the Court—REAVIS, J.

The opinion of the court was delivered by

REAVIS, J.—Action upon a written contract between appellant and A. V. Kautz, deceased, which was in substance that deceased agreed to pay \$360 per year for four years in consideration of appellant's attending Stanford University in California as a student therein. Appellant alleges that he performed the terms of the contract and attended the university for four years. Deceased, during his lifetime, continued to pay the sum annually which he had agreed. After his death the respondents refused to make further payments. Respondents filed an answer denying the performance of the contract by appellant and denying that there was any consideration for the contract, but alleging that, if there was any consideration, it was illegal and void. The cause went to trial before a jury in the superior court, and, before the introduction of testimony, counsel for respondents admitted the performance of the contract, *i. e.*, that appellant attended Stanford University as a student according to the terms of the contract, and tendered no proof of the illegality of the consideration, whereupon the superior court withdrew the cause from the jury and directed judgment to be entered in favor of appellant. Respondents had filed certain interrogatories calling for answers from the appellant and also moved for a new trial on the ground of errors in law, and accident and surprise occurring at the trial. The record does not disclose that any exceptions were taken by respondents at the trial, but an affidavit was filed by the respondents, on the part of counsel, to sustain the ground of accident and surprise. Possibly this affidavit may be sufficient. The superior court deemed it sufficient to warrant a new trial, and we have concluded, in view of the disposition that will be made of the case here, not to disturb the conclusion of the superior court upon the grounds for granting a new trial. Upon the granting of

the motion for a new trial respondents amended their answer and by such answer substantially the facts alleged in the complaint were admitted, except the consideration stated in the contract; but the answer, for affirmative defense, alleged that the consideration was illegal and void because against public policy, and stated the facts to be that appellant entered a competitive examination appointed by Mr. Doolittle, representative in congress from this state, to select candidates for appointments as cadets to the military academy at West Point and to the naval academy at Annapolis; that as a result of the examination the committee recommended three persons to Mr. Doolittle, the third of whom was Austin V. Kautz, a son of deceased, and that appellant was one of the candidates at the examination. The answer also states that after the examination Mr. Doolittle represented to deceased that he desired to appoint Austin V. Kautz to a cadetship at the naval academy, but also informed deceased that appellant was one of the three successful candidates at the competitive examination, and that Mr. Doolittle had promised to do something for appellant to enable him to get an education and that, if deceased would obligate himself to furnish funds sufficient to enable appellant to gain an education, he would appoint the son of deceased to the cadetship at the naval academy, whereupon, at the solicitation of Mr. Doolittle and in order to secure his son's appointment to the naval academy, deceased entered into the contract. The answer avers that the actual consideration was the obtaining from Mr. Doolittle by deceased the appointment of his son Austin to the naval cadetship and furnishing appellant a consideration such as would be sufficient to induce him to withdraw claims upon Mr. Doolittle for the appointment. There is an allegation also that appellant was above the legal age to enter the naval academy,

Apr. 1898.] Opinion of the Court — REAVIS, J.

and that fact was unknown to deceased and Mr. Doolittle, and was wrongfully withheld by appellant from them, so that they did not know of his ineligibility to the appointment. The first answers to the interrogatories propounded by respondents to the appellant were before the court at the new trial, and appellant had also obtained permission to file amended answers to his interrogatories, which were before the court at that time. The amended answers to the interrogatories denied that there was any other consideration for the contract than that expressed therein. The original answers to the interrogatories had stated the consideration of the contract to be the appointment of Austin V. Kautz by Mr. Doolittle to the naval academy, and the withdrawal of appellant from the competitive examination. There was also in the record, included in the affidavit of counsel for respondents for new trial, a letter from Mr. Doolittle in which he denied explicitly having been moved by such consideration. The superior court entered judgment in favor of respondents and dismissing the cause at appellant's costs, at the new trial. There does not seem to be any evidence of the illegal consideration for the contract set out in the complaint. The only inference of such consideration is found in the original answers of appellant to the interrogatories propounded by respondents, but these answers are explained and the amended answers do not sustain such a theory. If the letter of Mr. Doolittle was considered, it does not sustain such a defense. The written contract states a consideration which is sustained by the amended answers of appellant and by the letter from Mr. Doolittle. The burden of proof of the defense was upon respondents. The contract sets forth a good consideration. We do not doubt that appellant's attendance as a student at Stanford University for four years was a good and sufficient consideration to support the contract, and upon his performance

he could compel the performance of the obligation on the part of the deceased and his representatives. It may be observed that the affirmative defense is such as does not appeal to a high moral sense in the circumstances surrounding the case here.

The cause is reversed and remanded for further proceedings in the superior court.

SCOTT, C. J., and ANDERS, DUNBAR and GORDON, JJ., concur.

[No. 2745. Decided April 23, 1898.]

S. L. CONKLIN, *Respondent*, v. ALEXANDER BUCKLEY
et ux., *Appellants*.

MORTGAGES — FORECLOSURE — ESTOPPEL — ASSIGNMENT.

Where defendants in an action for the foreclosure of a mortgage are given the privilege of electing which one of two instruments given upon the same property to secure the same debt shall be foreclosed, they cannot raise the defense that the instrument chosen by them had been surrendered and canceled.

Where suit has been instituted by an assignee to foreclose a mortgage which had been duly transferred to him, and the defendant, having been given an election between two instruments given for the same debt, chooses the one for foreclosure which had not been assigned, equity would look to the substance of the matter and treat the assignment as covering the mortgage so selected by the defendant.

Appeal from Superior Court, Spokane County.—Hon. L. H. PRATHER, Judge. Reversed.

James Dawson, for appellants.

Jerry E. Bronaugh (*George W. Hazen*, of counsel), for respondent.

Apr. 1898.] Opinion of the Court — SCOTT, C. J.

The opinion of the court was delivered by

SCOTT, C. J.—A complicated state of affairs is presented by the record in this action, but it will not be necessary to set forth particularly all of the matters discussed in the briefs, and the following is a sufficient statement to present the substance of the controversy. The defendants executed to the Jarvis-Conklin Mortgage Trust Company a mortgage upon certain lands to secure a note in the sum of \$1,400, bearing date of April 3, 1889, providing for interest at the rate of ten per cent. per annum from date. For some reason the company objected to the form of these instruments, and by virtue of an agreement entered into between the parties they were surrendered and the record of the mortgage canceled in consideration of the execution of another set of instruments for the same debt, but in a different form; a note or bond in the sum of \$1,650 was executed, bearing date as of the first day of January, 1889, and providing for interest at the rate of six per cent. per annum, payable semi-annually from said date until its maturity five years thereafter, according to ten coupons attached, with a provision for interest at the rate of twelve per cent. per annum in case of non-payment, etc., and they executed a real estate mortgage upon the same property to secure the payment of it. The complaint in this action sets up these latter instruments and alleges an assignment thereof to the plaintiff, and prays for foreclosure. The answer set up the giving of the note and mortgage in the sum of \$1,400 as aforesaid and alleged its cancellation, and also alleged that there was no consideration for the second set of instruments, but it was shown that they were all given for one and the same debt, and it appears without any real controversy that the consideration for the surrender of the first instruments was the execution of the second. In consequence of several objections being raised upon the trial by the defendants to

the second set of instruments, such proceedings were had that the defendants were allowed to elect which one of the two mortgages should be foreclosed, and they elected to have the one foreclosed which was first executed to secure the note for \$1,400, and they have appealed from the decree against them. One of the contentions is that it was not within the power of the court to decree a foreclosure of this mortgage because it had been surrendered and canceled; in other words, that the defendants were not bound by their election and could not confer any power upon the court to foreclose it. A question was raised also as to the sufficiency of the proof of the assignment to the plaintiff, but it was competent to show a transfer to him of the note and mortgage declared upon in the complaint, and the prior note and mortgage which the defendants elected to be bound by having been given for the same debt as the one alleged in the complaint, but in a different form, equity would look to the substance of the matter and regard the first instrument as assigned to the plaintiff. Some other questions were raised as to the validity of the mortgage first executed, relating to the manner and sufficiency of its execution, but it is unnecessary to set them forth. Under the proceedings and proof shown there was no merit in any of the defenses alleged, and the defendants having elected in the action to be bound by the first mortgage were bound by it, and no room is left to question the plaintiff's right to recover. The defendants got all that they were entitled to when they were allowed to elect between these instruments, but it appears that the court thereafter rendered judgment for too large a sum. Judgment was given for \$1,400 with interest thereon at ten per cent. per annum from April 3, 1889, the time that note was executed. It is shown that certain payments had been made by the defendants, which had been credited upon the instruments described in the complaint.

Apr. 1898.] Opinion of the Court—SCOTT, O. J.

There seems to be some controversy as to the aggregate amount, viz., whether it was \$450 or \$495, and it does not appear clearly at what times said payments were made, but we understand it to be conceded that they were made to take up the six per cent. coupons on the note for \$1,650, and that those were all paid at or about their maturity. But in its judgment the court allowed interest upon the \$1,400 note up to the time of the decree and only deducted the amount of these payments without allowing any interest thereon, which would make a substantial difference between the amount so found and that justly due. This is practically conceded in respondent's brief, and he says if this court should find the decree excessive, he consents to a modification. If there is proof in the record to determine the actual amount due it has not been called to our attention and we will not investigate it, but will remand the cause to the lower court with instructions to set aside the decree and all proceedings thereunder, and render a new one in favor of the plaintiff for the amount due after crediting the defendants on the \$1,400 note with the amount of the payments made at the time they were made, and proofs may be taken to determine the same, if necessary. The appellants will recover costs from the time the decree appealed from was rendered, and the costs of this appeal.

Reversed and remanded accordingly.

ANDERS, DUNBAR, REAVIS and GORDON, JJ., concur.

[No. 2547. Decided April 25, 1898.]

MORAN BROS. COMPANY, *Respondent*, v. NORTHERN
PACIFIC RAILROAD COMPANY, *Appellant*.

APPEAL—OBJECTIONS NOT RAISED BELOW—CARRIERS OF GOODS—
TENDER OF CHARGES—REPLEVIN.

An objection that the pleadings do not show that a tender was kept good cannot be raised for the first time on appeal.

Where the carrier demands a sum in excess of the sum due for freight charges, the consignee need not tender any sum before bringing suit to recover the goods.

If a carrier has negligently delayed delivery of goods, or otherwise subjected itself to liability for damages in respect to the property carried, equal to or greater than the amount of the freight, the consignee may maintain replevin without a tender, and the claim for freight and the claim for damages may be adjudicated in the replevin suit.

Appeal from Superior Court, King County.—Hon.
RICHARD OSBORN, Judge. Affirmed.

Crowley & Grosscup, for appellant.

Preston, Carr & Gilman, for respondent.

The opinion of the court was delivered by

REAVIS, J.—Respondent commenced an action against appellant, claiming delivery of personal property of the value of \$200, and also to recover the sum of \$150 damages for detention of the same. The complaint alleged the incorporation of appellant and that appellant wrongfully and unlawfully detained the property from the possession of respondent, and that possession thereof had been demanded. A demand for judgment was made for the possession of the property and the sum of \$150 damages. The answer denied that respondent was entitled to possession of the property or that appellant wrongfully detained the

19	266
121	421
21	706
19	266
83	686

same, and denied that respondent had been damaged by the detention, and as affirmative defense the answer stated that defendant was a common carrier of freight and passengers for hire, operating a line of railroad between St. Paul, Minnesota, and Seattle, Washington, and that it received the personal property described in the complaint of an eastern connecting carrier in the state of Minnesota; that appellant paid the connecting carrier in the usual course of business back freight charges in the sum of \$57.40, and that appellant's charges for transporting the property from the Minnesota transfer to Seattle, Washington, were the regular and reasonable charges therefor, viz., the sum of \$140.70; and appellant demanded the sum of \$198.10 for so carrying such personal property, and claimed a lien thereon for the freight charges so earned, or the return of the property to its possession. Respondent, replying, admitted the carriage of its personal property as set up in the affirmative defense, denied that the value of the transportation thereof was any greater than \$75, and alleged that prior to the commencement of the action respondent tendered to appellant the sum of \$75. Upon these issues the case was tried by a jury, which returned a verdict that respondent was entitled to the possession of the property described in the complaint, and judgment was entered upon the verdict.

Two assignments of error are made; that the verdict is contrary to law, and that the court erred in entering judgment on the verdict. The record does not disclose that appellant urged the particular errors in the superior court relied on here. It has frequently been observed in this court that objections not going to the jurisdiction, in order to be available on appeal as a ground for reversal, must be presented and ruled upon by the trial court. *Rawson v. Ellsworth*, 13 Wash. 668 (43 Pac. 934); *Price v. Scott*,

13 Wash. 575 (43 Pac. 634); *Jenkins v. Columbia Land & Imp. Co.*, 13 Wash. 502 (43 Pac. 328); *State v. Owens*, 15 Wash. 468 (46 Pac. 1039); *Trust Co. v. Galliher*, 12 Wash. 507 (41 Pac. 887); *Weigle v. Cascade Ins. Co.*, 12 Wash. 449 (41 Pac. 53). That it was not stated the tender of \$75 was kept standing would have been good ground for demurrer, perhaps, but no objection was made to it.

“Where there is a defect, imperfection, or omission in any pleading, whether in substance or form, which would have constituted a fatal objection on demurrer, yet if the issue joined is such as necessarily required on trial, proof of the fact so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would have directed the jury to give, or the jury would have rendered, the verdict found, such defect, imperfection, or omission is cured by the verdict.” 28 Am. & Eng. Enc. Law, 417.

Where the sufficiency of a pleading is not questioned until after the verdict the same degree of strictness will not be applied as when questioned by demurrer, and a pleading will be good after verdict if it contains allegations from which every fact necessary to maintain the action or establish the defense may be fairly inferred. Though material facts are entirely omitted, yet if they are necessarily concomitants of the material facts alleged, so that in their findings the jury must have found the facts omitted, the defect is cured by verdict.

Where the carrier demands a sum in excess of the sum due for freight charges, the consignee need not tender any sum before bringing suit. *Adams v. Clark*, 9 Cush. 215 (57 Am. Dec. 41); *Isham v. Greenham*, 1 Handy, 357; 8 Am. & Eng. Enc. Law, 978.

If the carrier has negligently delayed delivery of goods or otherwise subjected itself to liability for damages in

respect to the property carried equal to or greater than the amount of the freight, the consignee may obtain replevin without a tender, and the claim for freight and the claim for damages may be adjudicated in the replevin suit. Cobbey, Replevin, § 515; 8 Am. & Eng. Enc. Law, 977.

The objections to the pleading should have been ruled upon by the superior court. The judgment is affirmed.

SCOTT, C. J., and DUNBAR and ANDERS, JJ., concur.

GORDON, J.—I concur in the result. Upon the pleadings in this case, I think the defendant would have been entitled to judgment. The reply admits that the sum of \$75 was lawfully due defendant for freight charges upon the property replevied, and, until this was paid or legal tender was made, defendant was entitled to retain possession. But defendant did not see fit to avail itself of this defect in the pleadings, and the record contains no bill of exceptions, statement of facts, or motion for a new trial. Not a ruling of the trial court is assigned as error, nor does it appear that any objection to the pleadings or to the evidence was made at the trial. Under these circumstances, we are bound to presume, in support of the judgment of the superior court, that evidence without which it could not legally have been rendered was duly given at the trial. Error must be affirmatively shown, and defects or irregularities not affecting the jurisdiction cannot be raised for the first time in the appellate court.

[No. 2908. Decided April 27, 1898.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHNNY TOMMY, *an Indian*, AND CHARLEY MOSES, *an Indian*,
Appellants.

MURDER—SUFFICIENCY OF INFORMATION—OATH TO JURY—INSTRUCTIONS—SEPARATION OF JURY—RECORD—APPEAL.

An information charging murder sufficiently describes the crime, when it alleges that defendant "did purposely and of deliberate and premeditated malice, kill one Kelly Annan, as follows" (describing the manner of killing), although the information does not allege that the particular acts or instrumentalities of the killing were done unlawfully, with deliberate and premeditated malice.

An oath obligating the jury to try a criminal case before them "according to the law and the evidence as given on the trial," is not prejudicial error, even if they are erroneously instructed as to the law upon a matter which is necessarily harmless to defendant.

The action of the trial court in overruling an application for continuance will not be considered on appeal, in the absence of a statement of facts.

Alleged errors in instructions as to evidence will not be considered on appeal, in the absence of a statement of facts.

In a prosecution of two defendants jointly, the failure of the court to instruct that a confession of one cannot be considered against his co-defendant, is not error, when the state expressly disavowed in open court any application of the confession as against the one not joining in it and when there were instructions as to what must be found against each defendant to warrant a verdict against him.

The jury in a criminal case may, at any time before the submission of the cause to them, be allowed to separate, under the authority of Code Proc., § 359 (Bal. Code, § 4999.)

Appeal from Superior Court, Skagit County.—Hon. J. P. HOUSER, Judge. Affirmed.

Apr. 1898.] Opinion of the Court—DUNBAR, J.

Sinclair & Smith, and Chambers & Smith, for appellants.

I. E. Schrauger, Prosecuting Attorney (E. P. Barker, of counsel), for The State.

The opinion of the court was delivered by

DUNBAR, J.—The appellants were tried for the crime of murder in the first degree. The information was as follows:

“Comes now I. E. Shrauger, prosecuting attorney for Skagit county, state of Washington, and informs this court by this information, that the above named Johnny Tommy (an Indian) and Charley Moses (an Indian), then and there being, did on or about the 5th day of May, 1897, within one year last past, in the county of Skagit, state of Washington, purposely and of deliberate and premeditated malice, kill one Kelly Annan (an Indian), as follows, to-wit: The said Johnny Tommy (an Indian) and Charley Moses (an Indian) did then and there being knock the said Kelly Annan (an Indian) down with an axe, then and there being, did cut his throat with a pocket knife, and then and there being did tie a weight, viz., a sack of sand, to the body of the said Kelly Annan (an Indian) and throw the said Kelly Annan (an Indian) into the Skagit river, from which said wounds and acts the said Kelly Annan (an Indian) died, in said Skagit county, state of Washington; contrary to the statutes,” etc.

Upon the trial of the cause the appellants were found guilty of manslaughter and sentenced to a term in the penitentiary. A demurrer was duly interposed to the information on the grounds, first, that the same does not substantially conform to the requirements of the law; second, that more than one crime is charged therein; third, that the facts charged therein do not constitute a crime; and fourth, that the same contains matters which, if true, constitute a defense and a legal bar to this action. The appellant, however, assigns for his first error the fact that the court overruled the demurrer to the information because

the same does not state facts sufficient to constitute a crime. The substance of the argument is that the indictment, while it alleges that the defendants purposely and of deliberate and premeditated malice killed Kelly Annan, does not allege that the particular acts or instrumentalities of the killing were done with malice deliberate and premeditated or that they were unlawfully done. We do not think this contention can be sustained. If the killing was done with malice it must necessarily follow that the particular acts which constituted the murder must have been done with malice. No good purpose can be subserved by holding to these technical requirements of the common law. This court has held time and again that these requirements have been displaced by the liberality and common sense provisions of our statutes. It is true that the statute requires particularity in the crime charged, but this indictment would not have furnished the defendants with any more particular notice of the real crime that was charged had it been burdened with the repetition of language which the appellants claim should have been employed. Our statute provides that the indictment or information is sufficient if it can be understood therefrom that the act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. Tested by the requirements of the statute, this information is sufficient to convey to the defendant notice of the exact crime with which he is charged, for no one would have the hardihood to say that a person of reasonable understanding would not know what was intended by this information. The case of *State v. Day*, 4 Wash. 108 (29 Pac. 984), cited by the appellant, is not in point, for there the objection which was sustained to the indictment was that it did not allege that the defendant

Apr. 1898.] Opinion of the Court — DUNBAR, J.

purposely and of his deliberate and premeditated malice killed the deceased.

The next objection is to the form of the oath administered to the jury, which was as follows:

“ You and each of you do solemnly swear that you will well and truly try and a true deliverance make in the case now on trial before this court, in which the state of Washington is plaintiff and Charley Moses and Johnny Tommy are defendants, according to the law and the evidence as given you on the trial; so help you God.”

We think there can be no objections to this oath. It is contended, however, by the appellant that the oath was prejudicial when taken in connection with instruction No. 38, which was as follows:

“ I further instruct you that if you find from the evidence in this case and beyond a reasonable doubt that Charley Moses made an admission or confession of guilt to any one, either by word or conduct, and you further find that such confession or admission was freely and voluntarily made and that there was no undue influence brought to bear upon him to induce him to do so, then I instruct you that you are entitled to take such fact into consideration and give to it such weight as you think it entitled to under the circumstances at the time; but if you believe that such admissions, if any, were made under threats, duress or undue influence, then I instruct you that if you so find, it would be your duty to wholly disregard such testimony and not allow it to have any influence upon your deliberations in this case.”

Without passing upon the legality of these instructions, it is sufficient to say that the testimony introduced in relation to this confession was admitted without objection, save that it should not apply to the other defendant, and the brief portion of the statement which was sent up, and which includes the testimony in regard to the confession,

shows that there was no testimony whatever in relation to confession under compulsion or fear, and the error, if any was committed, must necessarily have been harmless to the defendants; if either side was prejudiced by the instruction it was the state.

The third assignment is to the effect that the court erred in overruling defendants' motion for a continuance. An affidavit of continuance, which it is not necessary to set forth here, was filed and overruled. In the absence of a statement of facts we are unable to say that the court abused its discretion in overruling this affidavit. It was objected that the court erred in instructing the jury that "any evidence with reference to any settlement of the alleged killing according to the Indian customs is no defense to this action. Such evidence, if any you find, was admitted in this case for another purpose." In the absence of a statement of facts there is no way in which this court can determine whether or not such instruction was erroneous.

It is also contended that the court erred in instructing the jury in relation to the confession which we have just noticed, without proceeding further and instructing the jury that the alleged confession of Charley Moses could not be considered by them as against Johnny Tommy, and especially as the state disavowed any application of the confession to him. For the very reason, it seems to us, that the state did disavow such application it was not necessary for the court to instruct the jury that Johnny Tommy would not be held responsible for any confessions made by Charley Moses. The court was explicit in its instructions both as to what must be found against Johnny Tommy and Charley Moses, before either of them could be found guilty, and we are satisfied from the record that there was no misunderstanding in the minds of the jury on this proposition.

Another assignment of error is the action of the court in

Apr. 1898.]

Opinion of the Court—DUNBAR, J.

allowing the jury to separate without the consent of the appellants, and many cases are cited from this court to sustain the objection, but we do not think any of them are in point. The statute, § 359, of 2 Hill's Code (Bal. Code, § 4999), provides especially that the jury may separate at any time before the submission of the cause to them under proper admonition of the court. In this case the cause had not been submitted to the jury; in fact, the separation was immediately upon the swearing in of the jury, and we think the record fairly shows that it was made by consent of the defendants' attorneys. We think there is nothing in the contention that there was not sufficient in the information to charge the defendants with manslaughter, and that the instruction of the court in regard to that was erroneous. As we have before indicated, malice was charged in the information. The killing having been shown, the law presumes malice. This question was discussed at considerable length in *State v. Payne*, 10 Wash. 553 (39 Pac. 157), and we are satisfied with the conclusions reached in that case.

The examination of the entire record convinces us that no prejudicial error was committed, and the judgment will therefore be affirmed.

SCOTT, C. J., and ANDERS, GORDON and REAVIS, JJ.,
concur.

19 276¹
228 237

[No. 2563. Decided April 28, 1898.]

W. M. SNYDER, *Appellant*, v. ROBERT PARKER, *Respondent*.

APPEAL—SUFFICIENCY OF EVIDENCE—EQUITABLE MORTGAGE—EJECTMENT.

The verdict of a jury finding that a deed absolute in form is in fact a mortgage will not be disturbed, when there is substantial testimony upon which to base the verdict.

A deed absolute in form, but intended as a mortgage to secure a debt, passes no title to the grantee, and hence does not afford such title as to uphold an action of ejectment.

Appeal from Superior Court, Snohomish County.—Hon. FRANK T. REID, Judge. Affirmed.

Coleman & Hart, for appellant.

George E. Banks, for respondent.

The opinion of the court was delivered by

REAVIS, J.—Action to recover possession of land. Appellant claimed title under a warranty deed executed October 1, 1895. The deed was absolute in form. The complaint alleged that on the first of October, 1895, appellant leased the premises to respondent for a term of one year and that the term had expired and respondent refused to surrender possession. Respondent answered, denying appellant's title and setting up that the deed, though absolute in form, was in fact a mortgage to secure the payment of a debt. The action was tried with a jury and a verdict was returned in favor of respondent. A motion was made for a new trial and denied, and judgment entered upon the verdict, from which appeal is taken. The principal error assigned is denying appellant's motion for judgment on the evidence. We have examined the evidence brought up in

Apr. 1898.]

Opinion of the Court — REAVIS, J.

the record and cannot conclude there is not sufficient to justify the verdict of the jury. Respondent was in possession of the premises at the time of the execution of the instrument. There seems to have been no stipulation relative to possession between the parties at the time of its execution. It was not to be recorded for six months after its execution for the reason that respondent might have an opportunity to negotiate a loan or execute a mortgage upon the premises to pay the debt for which the deed was executed. Respondent testified that the deed was executed to secure a debt; appellant on the contrary that it was executed in payment of the debt. There was a written memorandum, unsigned, but upon the envelope enclosing the deed, which was delivered to the appellant at the time of its execution, which recited that the deed was to be delivered to respondent by appellant upon the payment by respondent to the First National Bank of Snohomish of the sum of \$1,018.80, with interest thereon at one per cent. per month from March 27, 1894, and the further sum of \$100 attorneys' fees in a suit of respondent against one Stevens within one year from the same date, and also that the deed was not to be recorded within six months of the date, unless respondent died. The bank mentioned also held a mortgage executed by Stevens to respondent as collateral security for the same debt. Under the terms of the memorandum this mortgage was to be reassigned by the bank to respondent upon payment of the sum mentioned. The debt was evidenced by a promissory note which was not canceled. We are not satisfied that there is any error in the instructions of the superior court to the jury, and there was substantial testimony upon which the jury found that the instrument, although absolute in form, was in fact a mortgage.

The only remaining question is the legal effect of such an instrument. Appellant has cited some early California

cases, particularly that of *Hughes v. Davis*, 40 Cal. 117, to maintain the proposition that a mortgage in the form of an absolute deed conveys the legal title to the grantee. But the later cases from California do not sustain such doctrine. In *Healy v. O'Brien*, 66 Cal. 517 (6 Pac. 386), the court says, when the deed sued on in ejectment is shown to be a mortgage, if answer seeks to redeem, judgment should provide for foreclosure and sale. In *Smith v. Smith*, 80 Cal. 323 (21 Pac. 4), the court said:

“It is the settled rule in California that if a deed absolute in form was made merely to secure the payment of money to the grantee, it is a mortgage, and does not pass the title. Such a deed gives a mere lien upon the property just as if the parties had put their agreement in the form of a mortgage, and consequently does not give the right of possession to the grantee.”

The same views are expressed in *Murdock v. Clarke*, 90 Cal. 427 (27 Pac. 275). 1 Jones on Mortgages, § 20, cites authorities and comes to the conclusion that

“Even an absolute deed without any defeasance, if in fact made to secure a debt, so that in equity it is a mortgage, passes no title to the grantee.”

See, also, §§ 669 and 717. The statute of this state, 2 Hill's Code, § 539 (Bal. Code, § 5516) declares:

“A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law.”

It is an elementary principle that in ejectment the plaintiff must recover on the strength of his own title. The instrument in suit having been found a mortgage, appellant should not recover possession under its terms.

The judgment of the superior court is affirmed.

SCOTT, C. J., and ANDERS, DUNBAR and GORDON, JJ., concur.

Apr. 1898.] Opinion of the Court—Scott, C. J.

[No. 2777. Decided April 28, 1898.]

THOMAS A. CASEY *et al.*, *Appellants*, v. WILLIAM MALIDORE, *Respondent*.

NEW TRIAL—IMPOSITION OF TERMS—WAIVER OF COSTS.

Where a new trial is granted plaintiff, because of error of the court in ruling that his complaint does not state a cause of action, the plaintiff is entitled to the new trial unconditionally, and it is error to impose terms that his motion will be granted on condition of his filing a waiver of costs to date.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Reversed.

G. L. McKay, for appellants.

Byers & Byers, for respondent.

The opinion of the court was delivered by

SCOTT, C. J.—This is substantially an appeal from an order denying a motion for a new trial. When the cause came on for trial the defendant objected to the introduction of any evidence on the ground that the complaint did not state a cause of action, and this motion was sustained. Thereafter the plaintiffs moved for a new trial, and the motion was granted on condition that the plaintiffs should within ten days file a waiver of costs to date. This order was made on the 28th day of May. On June 8th following the court rendered a judgment for the defendant, reciting therein the previous orders and that the terms of the order providing for a new trial had not been complied with, and that the motion was therefore denied. Thereafter the plaintiffs moved to vacate this judgment, setting up the foregoing proceedings and making a showing that they had attempted to comply with the order providing

for a new trial in substance as follows, viz., that the office of the plaintiffs' attorney was in Tacoma; that on the 29th or 30th day of May, said attorney received notice of the conditional order for a new trial, the matter having for some days prior to May 28th been held by the court under advisement; that some further correspondence was necessary; that the plaintiffs resided at Buckley and it was also necessary to communicate with them; that on the morning of the 7th of June said attorney duly mailed, etc., a letter addressed to the judge who had acted in said matter containing a waiver of the said costs, and that it should have been delivered to him either that day or the next morning, and that it was delivered to him before the judgment was entered on said day. The motion to vacate was denied and the plaintiffs took this appeal.

A compliance with the order for a new trial would have required a filing of the waiver of costs with the clerk of the court on or before June 7th. It was not a correct practice to send it to the judge at all. But, overlooking this, there was no proof that it had been received by the judge before June 8th, and the time expired on the 7th. Nor was there a sufficient showing of diligence to warrant our holding that there was an abuse of discretion upon the part of the court, if that question could be considered under the circumstances, and the action of the court in denying the motion for a new trial and in refusing to vacate the judgment would have to be sustained, if considered with reference to the showing as to a compliance with the order. But it is contended that the court had no right to impose terms at all as a condition of granting the motion for a new trial. The motion was founded upon subd. 8 of § 400, 2 Hill's Code (Bal. Code, § 5071), viz., an error in the ruling of the court that the complaint did not state a cause of action. And, if the ruling was erroneous, a new trial should

May, 1898.]

Syllabus.

have been granted unconditionally. The action was in replevin and was brought to recover "one hundred cords of shingle bolts and all cedar timber" situated on certain real estate described in the complaint. One of the objections raised was that the complaint failed to allege the partnership of the plaintiffs, but it was allowed to be amended in this respect. The second was that the action was brought to recover standing timber, and that this could not be replevied; and the third was that it did not appear that the property was situated in King county. Whatever the construction of the complaint should be as to the cedar timber, whether cut or standing, clearly the shingle bolts were personal property, and the complaint as to them stated a cause of action; the particular land upon which they were situated was described, with the allegation also that it was in King county, where the action was brought. It was error to sustain the objection to the introduction of any evidence. The subsequent action of the court in refusing to set aside the verdict and in rendering judgment is reversed and the cause remanded for a new trial without terms.

ANDERS, DUNBAR, GORDON and REAVIS, JJ., concur.

[No. 2634. Decided May 2, 1898.]

PRUSSIAN NATIONAL INSURANCE COMPANY, OF STETTIN, GERMANY, *Respondent*, v. NORTHWEST FIRE AND MARINE INSURANCE COMPANY OF PORTLAND, OREGON, *Appellant*.

19	281
482	404

APPEALABLE ORDER — GARNISHMENT — MOTION TO QUASH.

An order overruling a motion to quash a service of summons is not such a final order as determines the action, and hence is not appealable.

Where an action is brought in this state against an insolvent foreign corporation, for which a receiver has been appointed in a foreign jurisdiction, to whom all its assets have been assigned, and a writ of garnishment has been issued against a resident debtor of the corporation to recover upon a note and mortgage, such corporation cannot by special appearance move to quash the writ of garnishment, as whatever interest it has in the mortgage debt may be asserted in conjunction with the defense to the garnishment set up by the payors of the note.

Appeal from Superior Court, Thurston County.—Hon. CHARLES H. AYER, Judge. Affirmed.

Haight & Owings, for appellant.

Murray & Christian, for respondent.

The opinion of the court was delivered by

REAVIS, J.—Appellant was a corporation organized under the laws of Oregon. Its business was that of fire and marine insurance. In January, 1895, it filed its petition in an Oregon court to wind up its affairs and distribute its assets among its creditors as an insolvent corporation. A receivership was prayed for, and a decree dissolving the corporation and directing the settlement of its business and the distribution of its property. An order was made appointing a receiver and directing the company to transfer in proper form all its property, real and personal, to the receiver, so as to vest the title in him. The transfer was made with the consent of the company, the purpose stated being to protect all its creditors. The transfer was duly approved by the court. Among the assets so assigned was a note of \$8,000 secured by a mortgage on real property in Seattle. The note, among other securities, was held by the state treasurer of Washington for security of the policy holders in this state, and to enable appellant to transact business here according to the laws of the state. A notice of the assignment was given to the state treasurer on the

May, 1898.] Opinion of the Court—REAVIS, J.

20th of December, 1895. December 21, 1895, an action was instituted by Thomas Shaw, on behalf of himself and all others interested, against appellant and its receiver and the state treasurer of Washington in the superior court of Thurston county, for the purpose of disposing of the assets deposited with the treasurer to secure policy holders and ascertaining the indebtedness secured thereby. A decree was entered fixing such liabilities and directing the transmission of the note and mortgage to the Oregon receiver, which was done about December 21 or 23, 1895.

The plaintiff in this action is a corporation organized under the laws of Germany. It filed its complaint in the superior court, alleging that appellant was indebted to it on a balance due on re-insurance contracts. Summons was served upon the appellant by delivering a copy to its attorney appointed and acting for appellant to accept service of process under the laws of this state. Upon affidavit made in behalf of plaintiff (respondent) a writ of garnishment was issued and served upon the payors of the \$8,000 promissory note above mentioned at their residences in Seattle. The garnishees appeared and answered denying any indebtedness to appellant. Respondent controverted the answer of the garnishees. Appellant then specially appeared and moved to quash the service of summons made by respondent upon the attorney of appellant, and also specially appeared and moved to quash the writ of garnishment issued and served upon the payors of the promissory note, and by affidavits filed in the superior court substantially set out the facts hereinbefore stated. The superior court overruled the motion to quash the service of summons and also the motion to quash the writ of garnishment, from both of which orders appellant appealed. Respondent moves to dismiss the appeal from each order, on the ground that they are not appealable. We think the motion to dismiss the appeal on

the order refusing to quash the summons must be granted. It is not such a final order as determines the action.

Upon the facts stated by appellant the receiver appointed for appellant by the Oregon court has the rightful possession of the \$8,000 promissory note, the amount of which had been garnished. We do not decide here whether the special appearance made by appellant in the motion to discharge the writ of garnishment is an appearance in the action as required by § 5376, Ballinger's Code (Code Proc. §318). But appellant's interest, whatever it may be, in the possession and realization upon the \$8,000 note is identical with the receiver's and a defense to the garnishment of the payors of the note can be made in conjunction with the garnishees. We can see no reason for the special appearance and motion made by appellant in the superior court. The order of the superior court refusing to grant the motion to quash the writ of garnishment made by appellant is affirmed.

SCOTT, C. J., and ANDERS, DUNBAR and GORDON, JJ.,
concur.

[No. 2666. Decided May 2, 1898.]

EDWARD F. WHITE *et ux.*, *Respondents*, v. CITY OF
BALLARD, *Appellant*.

MUNICIPAL CORPORATIONS — NEGLIGENT CONSTRUCTION OF STREETS —
CONTRIBUTORY NEGLIGENCE.

Whether a city was negligent in the construction of a street is a question for the jury and their verdict will not be disturbed, when the evidence shows that the planking on the driveway of the street narrowed at a certain point from sixteen to eight feet in width, that the street at that place was elevated more than four feet, without a guard rail along the side, and that an

19	284
24	197
19	284
d27	717
19	284
29	554
29	590
19	284
30	71

May, 1898.] Opinion of the Court — REAVIS, J.

ordinarily safe horse, accustomed to bicycles, became frightened at a bicycle while upon such portion of the street and backed over the side of the highway into the depression below, injuring one of the occupants of the buggy to which it was attached.

Where a horse is accustomed to bicycles and ordinarily under the control of the driver, it is not contributory negligence on his part to neglect to alight from his buggy and hold the horse's head upon meeting passing bicycles.

Appeal from Superior Court, King County.—Hon. ORANGE JACOBS, Judge. Affirmed.

P. V. Davis, for appellant.

Brinker, Jones & Richards, for respondents.

The opinion of the court was delivered by

REAVIS, J.—Plaintiffs (respondents) on the 29th of March, 1896, were driving along A street, in the city of Ballard, on their way from Fremont. Shilshole avenue intersects this street at an angle, and is a continuation of A street. Where A street enters Shilshole avenue at the turn on the right is a building which obstructs the view down the avenue, so that the driver of a vehicle cannot see before entering the avenue who may be traveling or what vehicles may be on the avenue. From the point of intersection of A street with the avenue there is a distance of fifty-six feet of street, planked sixteen feet wide, and this street sixteen feet wide then terminates at a point where the planking narrows to eight feet in width. On the eight-foot planking teams cannot pass each other. On the left the ground drops off a distance of four feet and four inches, and on the right it drops off a distance of two feet. One must pass a team on this sixteen-foot roadway elevated above the ground within a distance of fifty-six feet. Plaintiffs were driving in a one-horse top buggy. After driving onto the planking sixteen feet wide, the driver observed several bicycles on the eight-foot planking, and stopped his horse for them to pass.

As the last bicycle approached the horse's head the horse became frightened. The driver called to him, and touched him with his whip, but the horse continued backing about thirty-five feet diagonally across the road, getting off the planking to the depression below, and the accident ensued by which the plaintiff Retta White was injured. There was no guardrail where the accident occurred. The position of plaintiffs is that the construction of the street was negligent; that plaintiff could not see what was on the avenue before entering it; that there was not sufficient space to turn when the horse became frightened; that the bicycles could not be passed on the eight-foot planking; that it could be reasonably foreseen that an ordinary horse might back if frightened; and that there was not sufficient guard or space to allow the driver to regain control of his horse. The evidence shows that the horse was accustomed to bicycles on the streets of Seattle, and was an ordinarily safe horse. The question of negligent construction and condition of the street, upon these facts, was certainly one for the jury, and there is substantial evidence to sustain their deduction of such negligence. The bicyclists who occasioned the fright of the horse were not guilty of any negligence or wrong. It was, then, a question for the jury to determine whether the negligent condition of the street was the proximate cause of the injury. We are satisfied with the instructions of the superior court given to the jury upon the question of negligence. It would be of but little value to review the almost infinite number of cases upon this question. Streets must be so constructed that the ordinary horse, with the ordinary disposition, allowing for the ordinary incidents of 'caprice or fright, can be driven with reasonable safety on them.

Appellant complains that certain instructions were not given upon the question of contributory negligence on the

May, 1898.]

Syllabus.

part of the plaintiffs. There is no tangible evidence of such negligence on the part of the driver of the horse. There were several elements that entered into the causation of the accident. If the driver of the horse had seen the bicycles before entering the avenue, he might have stopped, but the obstruction prevented this. If the driver had alighted from the buggy, and taken the horse by the head, the accident would probably not have occurred; but with a horse accustomed to passing bicycles, and ordinarily under the control of the driver, he would not be required to alight from his buggy under the penalty of contributing to the accident unless he did so. We do not think it can be said that the damages (\$2,250) awarded by the jury were excessive. There being no error in the instructions of the court, and substantial evidence to support the verdict of the jury, we can see no error in the judgment, and it is affirmed.

ANDERS, DUNBAR and GORDON, JJ., concur.

[No. 2486. Decided May 5, 1898.]

JOHN H. THOMAS, *Appellant*, v. HENRY McCUE *et ux.*,
Respondents.

RESCISSION OF CONTRACT—LACHES.

Where one party to a contract intends to rescind it on account of a breach of it by the other, he must elect to do so speedily on the discovery of the breach; for delay is evidence of a waiver of the misconduct of the other party and is itself deemed an election to treat the contract as valid and binding.

Appeal from Superior Court, Whatcom County.—Hon. JOHN R. WINN, Judge. Affirmed.

J. W. Rayburn (*T. L. Stiles*, of counsel), for appellant.
S. M. Bruce, and *O. P. Brown*, for respondents.

The opinion of the court was delivered by

ANDERS, J.—On February 1, 1890, the respondents and the appellant entered into a contract in writing wherein and whereby the former covenanted to sell, and the latter to purchase, a certain tract of land in the county of Whatcom and state of Washington, described as lots Nos. 4 and 5, and the west half of the southwest quarter of section 27, Tp. No. 38, N. of range No. 3 east, containing 159.50 acres. The appellant agreed to pay for the same in the following manner: \$2,000 in cash to be paid on or before thirty days from date; \$9,472.18 on or before one year from the date of said first payment, and \$9,472.18 on or before two years from the date of said first payment, together with interest thereon at 8 per cent. per annum from date. The appellant was by the contract constituted an attorney in fact of the respondents to dedicate to the public any plat that he or his assigns might lay on the land at his own expense, the manner of such platting being left to the judgment of appellant. The respondents reserved the right to retain one-eighth of the number of lots laid out in each block with a proportionate number of corner lots, and, as a part of said one-eighth, they also reserved the right to 100 feet square at the mineral springs on said land, to be selected so as not to interfere with streets laid out, if possible. It was also provided that the appellant should, at any time after the payment of said \$2,000, have a right to a deed to any block that was not on the water front and not reserved by the respondents, on paying therefor at the rate of \$300 per acre, and that appellant might deduct from the last payment the amount then due to the Guarantee Loan and Trust Company on a mortgage then on said premises. Respondents also reserved the privilege of occupying the house and meadow for themselves, if they so

May, 1898.]

Opinion of the Court—ANDERS, J.

desired, for a period of one year from the date of the contract. The appellant was also to pay all taxes or assessments thereafter levied or imposed upon the premises. In regard to performance and payments the contract contained these provisions:

“Whereas it is the intention of the parties hereto and they hereby covenant and agree that the times mentioned for the performance or the payment of the said sums and interest thereon, as specified, is essential herein, and that no estimate can be made of the damage which would accrue to said obligors by default in the performance thereof, at the stated times, and whereas it is hereby mutually covenanted and agreed, in consideration of the premises, that default, either in the payments, the whole or any part of said unpaid purchase money, with interest thereon promptly, according to the time above mentioned, or default in the payment of the taxes or assessments aforesaid at their maturity, shall in and of itself, without notice and without proceeding in any Court work a forfeiture of all money paid and of all rights of the property or possession, of, in, or to said premises, or any part thereof, or improvements thereon at law or in equity. Now therefore if said John H. Thomas or his assigns shall pay each and all of said payments, with interest thereon at maturity, and shall in the meantime pay all taxes on said premises; and the said Henry McCue shall, on the completion of said payments, make, execute and deliver or cause to be made, executed and delivered, a good and sufficient warranty deed to the said John H. Thomas, or his assigns for said property, or for said block or blocks, as above set forth, then this obligation to be void, otherwise to remain in full force and virtue,”

the agreement being in the form of a bond on the part of the respondents. This contract was recorded in the office of the county auditor of Whatcom county on the day of its execution. Within a very short time thereafter, Cannon and Steele instituted an action in the superior court of

Whatcom county to obtain a decree declaring them to be the real owners of the contract and appellant their trustee. This action, it appears, was not brought to trial, and was dismissed on March 21, 1891. After the commencement of this action and on May 29, 1890, the respondents brought an action against the appellant to have the contract rescinded and declared a cloud upon their title, and then removed, on the ground that the appellant had, by fraudulent misrepresentations as to certain facts, overreached them in the contract. A *lis pendens* was filed in the case by the plaintiffs. This action was continued from time to time and was finally dismissed and the costs paid by the respondents on January 4, 1893. Prior to that time and on March 25, 1892, the respondents sold and conveyed to the Bellingham Bay & Eastern R. R. Co. a right of way over a portion of lot five, consisting of about three acres. On April 12, 1893, the respondents instituted another action against the appellant for the purpose of obtaining a judgment for the amount of the last installment of the purchase price and interest and asked that such judgment be made a lien on the appellant's interest in the land mentioned in the contract; and on the 4th of May following judgment was rendered against the appellant by default for the amount found due; execution was subsequently issued thereon and the land sold by the sheriff and bid in by the respondent, Henry McCue, for the amount of the judgment and costs, and said judgment was thereupon satisfied of record. On February 28, 1890, appellant paid the first installment of the purchase price, being \$2,000, by depositing the same in the Bellingham Bay National Bank of Sehome in accordance with the terms of the contract, and on December 28th of the same year he paid the taxes then due on the land. On March 3, 1891, he deposited the amount of the second install-

May, 1898.] Opinion of the Court—ANDERS, J.

ment in said bank to the credit of Henry McCue. He did not at any time plat the land into lots and blocks, nor did he pay, or offer to pay, the balance of the purchase price due February 28, 1892; but he paid the taxes due on the land in the years 1893 and 1894. Nothing further was done by appellant in relation to the contract until January 29, 1896, at which time he delivered to the respondent, Henry McCue, a quitclaim deed to the land, on condition, as he alleges in his complaint, that the latter would repay to him the amount of the purchase money and taxes paid under the contract, together with interest thereon to date. At the same time he demanded of McCue the payment of \$18,000 as damages. These demands were not complied with and appellant on the following day commenced this action, the purposes of which were, as stated in his brief, (1) to rescind the contract between himself and the respondents, and incidentally to vacate the judgment against him of May 4, 1893, (2) to foreclose a vendee's lien and (3) to recover the sum of \$25,000 damages for the violation of the written agreement. He set up in his complaint that the respondent, Henry McCue, with intent to cheat, defraud and swindle the plaintiff represented to him that the land above described and every part thereof was free from all incumbrances of whatsoever kind or nature except a mortgage held by the Guarantee Loan and Trust Company, which representation the plaintiff believed to be true, and relied upon the same; and that at the time of the making of said contract, as the said McCue well knew, the land was subject to an easement granted to the Bellingham Bay Water Company by a deed executed on April 3, 1889. The complaint further stated the facts already mentioned and also that the plaintiff was prevented from further executing the contract by the commencement of the actions against him by the defendants,

and the withholding from him of the possession of the land. A demurrer was interposed to the complaint upon several grounds, among which was that it failed to state facts sufficient to constitute a cause of action. This demurrer was overruled by the court and the defendants answered by denying certain portions of the complaint and pleading affirmative defenses. The new matter in the answer was denied in plaintiff's reply and upon the issues joined the cause proceeded to trial by the court without a jury, resulting in a judgment for the defendants, dismissing the complaint at the cost of the plaintiff, and the latter has brought the case to this court for review on appeal. Counsel for the respondents insist here, as they did in the court below, that the complaint fails to state facts sufficient to constitute a cause of action, and it must be conceded that this contention is not without considerable force. The principal trouble with the complaint is that the pleader undertook to make it too general and comprehensive. If it was intended to bring an action for the recovery of the money paid under the contract, he cannot recover unless it appears from the whole case that he is entitled to a rescission of the contract. *Distler v. Dabney*, 7 Wash. 431 (35 Pac. 138, 1119). If it was intended to state a cause for rescinding the contract, then it is at least questionable whether he should not have shown an offer or willingness to perform upon his part. We think, if the complaint states a cause of action at all, it is one for a rescission of the contract in question. And, conceding that the facts stated are sufficient to entitle him to a rescission, the question still remains whether, under the proofs and pleadings, he was entitled to the relief at the time the action was commenced. And we are of the opinion that this question must be answered in the negative. Rescission is a remedy which is not to be invoked as a matter of course or of absolute right, but,

May, 1898.] Opinion of the Court—ANDERS, J.

like specific performance, its exercise rests in the sound discretion of the court. 2 Warvelle, Vendors, p. 833. A court of equity in rescinding a contract proceeds upon the assumption that it can result in no injustice to place both parties in the position in which they were prior to the making of the contract; and this can only be fairly done, in cases of contracts in relation to land whose value is largely speculative and subject to sudden changes, soon after the contract is entered into. Before a party can justly claim a rescission he must not only show that the opposite party is derelict, but that he himself is without fault, for the law permits no one to take advantage of his own wrong to terminate a contract which he has knowingly and voluntarily made. There is another principle adopted by the courts and which is often a controlling one in cases like the present, and that is, that, where one party to a contract intends to rescind it on account of a breach of it by the other, he must elect to do so speedily on the discovery of such breach. Delay in rescission is evidence of a waiver of the misconduct of the other party and is itself deemed an election to treat the contract as valid and binding. *Hogan v. Kyle*, 7 Wash. 595 (35 Pac. 399, 38 Am. St. Rep. 910); *Scheftel v. Hays*, 58 Fed. 457; *Rugan v. Sabin*, 53 Fed. 415; *McLean v. Clapp*, 141 U. S. 429 (12 Sup. Ct. 29); *Grymes v. Sanders*, 93 U. S. 55; *Hayward v. Bank*, 96 U. S. 611. The rule deduced from the authorities in relation to rescission is well stated in 2 Warvelle on Vendors, at page 836, as follows:

“Where a party intends to abandon or rescind a contract on the ground of a violation of it by the other, he must do so promptly and decidedly on the first information of such breach. If, with full knowledge or with sufficient notice or means of knowledge of his rights and of all the material facts, he lies by for a considerable time, or abstains from impeaching the transaction, so that the

other party is induced to suppose that it is recognized, this will be an acquiescence, and the transaction, although originally impeachable, ceases to become so in equity."

In *Hayward v. Bank*, *supra*, the court said:

"The question of acquiescence or delay may often be controlled by the nature of the property which is the subject of litigation. 'A delay which might have been of no consequence in an ordinary case, may be amply sufficient to bar relief when the property is of a speculative character, or is subject to contingencies, or where the rights and liabilities of others have been in the meantime varied. If the property is of a speculative or precarious nature, it is the duty of a man complaining of fraud to put forward his complaint at the earliest possible time. He cannot be allowed to remain passive, prepared to affirm the transaction if the concern should prosper, or to repudiate it if that should prove to his advantage.'"

Applying these principles to the case before us, it would seem manifestly unjust to the respondents to permit the appellant to rescind his contract and recover the amount paid thereon. The appellant contends, however, that he is absolved from all obligations under the contract for the reason that the respondents have incapacitated themselves either to convey the land free from incumbrances or to convey the whole amount bargained for. He insists that he is under no obligation either to accept incumbered property or a less amount of land than that specified in the contract. But, conceding that he would have had sufficient ground for asking for a rescission when he discovered that the land was subject to the right of way to the water company, it was his duty, under the authorities which we have cited, to avail himself of his option at that time. And the same remarks are equally applicable to the objection that the respondents are unable to convey all the land they agreed to convey by their contract. The proof

May, 1898.] Opinion of the Court—ANDERS, J.

shows that at the time this contract was made the premises in controversy were worth some \$200 or \$225 per acre, that in April, 1892, the time when the conveyance of the right of way was made to the railroad company, it was worth only about \$50 less. In October, when appellant says he first became aware of this conveyance it was worth \$50 per acre, but at the time of the commencement of this action it was worth not to exceed \$25 per acre and not in demand at that. If appellant had asserted his rights when he became aware of the grievances of which he now complains, there would have been an opportunity for the respondents to have sold the land to other parties and repaid the purchase money without material loss. But at the present time that would be impossible and a rescission would entail upon the respondents the loss of many thousands of dollars occasioned by the indecision and inaction of the appellant. The appellant himself testified at the trial that he did not make up his mind to rescind his contract until about a week before he tendered the quit claim deed to McCue on January 29, 1896. It was then too late to rescind, or treat as rescinded, the contract which his long silence had ratified.

We have carefully examined all of the appellant's assignments of error and have spared no labor in endeavoring to arrive at a just decision as to the rights of the respective parties to this unfortunate transaction, and we have been forced to the conclusion that the judgment of the court below was right, and it is therefore affirmed.

GORDON, DUNBAR and REAVIS, JJ., concur.

[No. 2704. Decided May 5, 1898.]

JOHN SHEPICH, *as Guardian, Appellant*, v. KENT LUMBER COMPANY, *Respondent*.

SALES—ASSIGNMENT OF CONTRACT—LIABILITY FOR PRICE.

The fact that persons obligated for the payment of the purchase price of standing timber under a contract with the owner of the land, subsequently incorporate and assign all their interest in the contract to the corporation, would not render the corporation liable for the purchase price, in the absence of a specific promise on its part to pay the land owner for the timber.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

Brady & Gay, and *Milo A. Root*, for appellant.

John G. Barnes, for respondent.

The opinion of the court was delivered by

REAVIS, J.—Steglich entered into an agreement with Lysander and A. E. Smith on the ninth of December, 1892, which substantially states that Steglich, in consideration of payments hereinafter mentioned, to be paid by the Smiths, did grant, sell, convey and confirm unto said Smiths all the merchantable timber, down and standing, on certain described premises, and it is understood and agreed that the Smiths have the right and privilege of constructing and using skid roads, train roads and railroads on and across the premises as they may deem necessary, for a period of three years to remove the timber on the premises and timber on lands adjoining, and the Smiths agreed to pay, as full compensation for the timber and privileges, lumber of the value of \$200 to be delivered according to the order of Steglich, and \$500 to be paid in cash in five installments, the last of which was on

May, 1898.] Opinion of the Court—REAVIS, J.

March 4, 1894. When the contract was executed the Smiths were in partnership, doing business under the name of the Kent Mill Company. In June, 1894, a corporation was formed called the Kent Lumber Company, the incorporators of which were Lysander and A. E. Smith. On the 13th of June, 1894, the Smiths sold, assigned, transferred and set over to the defendant, the Kent Lumber Company, all their right, title and interest in and to the said agreement. At the time the contract was assigned to respondent, Kent Lumber Company, the Smiths had only paid about one-third of the purchase price of the timber. Steglich was adjudged insane in December, 1894, and appellant appointed as his guardian. The Smiths had cut and removed only a portion of the timber when the assignment was made. After his appointment as guardian of Steglich, appellant sought to enjoin respondent from cutting and removing timber, but was denied a permanent injunction, respondent claiming the right to take timber by virtue of the contract. In this action appellant sought to recover judgment against respondent and defendants Smith for the balance of the purchase price under the contract for the timber. After appellant's testimony was in, the superior court granted a motion for nonsuit in favor of the respondent. Appellant then dismissed his action against the Smiths without prejudice and appealed from the judgment of nonsuit in favor of the respondent. Without a specific promise to pay Steglich, or appellant, for the timber, it is difficult to see, under the terms of the agreement, how respondent can become bound for the purchase price. For a valuable consideration it purchased the contract and in the absence of fraud the presumption is that it became obligated to, or paid, the Smiths for the timber. In the agreement there does not seem to be any reservation of lien upon the timber for

the purchase price. The timber was sold to the Smiths. They and respondent cut and removed it immediately. Title passed at any rate as soon as it was severed from the land. The fact that the Smiths were given time to pay the purchase price instead of making a cash payment does not change the nature of the agreement.

The judgment of the superior court is affirmed.

SCOTT, C. J., and ANDERS, DUNBAR and GORDON, JJ.,
concur.

[No. 2821. Decided May 5, 1898.]

MARY A. DENNY *et al.*, Respondents, v. NORTHERN
PACIFIC RAILWAY COMPANY, Appellant.

TIDE LANDS — PREFERENCE RIGHT TO PURCHASE — RES JUDICATA —
PLEADING.

A judgment against plaintiff in an action seeking to enjoin defendants from wharfing a strip of tide land abutting on land purchased by them of plaintiff, which disputed strip had been occupied by them over twenty years, is conclusive on the parties and those claiming through them, as to the title to the disputed strip.

Under Laws 1895, pp. 554, 562, §§ 61, 82, providing that in contests before the board of land commissioners respecting the right to purchase tide lands, no formal pleadings are necessary, and that on appeal to the superior court the contest may be tried upon the same pleadings unless ordered amended by the court, a judgment in another action, constituting *res judicata*, may be proven without being pleaded.

Where one holding a government patent covering upland and tide land conveys a portion of the upland, it passes to the grantee littoral rights in the abutting tide land, and a possession of such abutting tide land by the grantee for more than twenty years, in connection with the state's disclaimer to patented lands, would constitute a perfect title in the grantee.

Under the provisions of the statute giving the upland owner the preference right of purchasing adjoining tide lands, no right is

May, 1898.] Opinion of the Court—GORDON, J.

given the owner of a piece of tide land to come in as a preferred purchaser of abutting tide land.

Where the boundaries of a disputed strip of tide land have been recognized for twenty-five years both by contract and the conduct of coterminous proprietors as appurtenant to a certain portion of the upland, and the authorities have platted the tide land in conformity with such lines, which have been adopted by the contestants in presenting their respective applications to purchase, the objection cannot be raised by the appellant that the disputed tide-land, owing to the conformation of the shore, really abuts upon other lands than those of respondents.

Appeal from Superior Court, King County.—Hon. WM. HICKMAN MOORE, Judge. Affirmed.

Crowley & Grosscup, and *Donworth & Howe*, for appellant.

John J. McGilvra, and *Blaine & DeVries*, for respondents.

The opinion of the court was delivered by

GORDON, J.—This appeal is from a decree of the superior court of King county rendered in a cause appealed to that court from the decision of the board of state land commissioners, and involves the right to purchase certain tide lands lying in front of the city of Seattle. Each of the parties to this controversy claims the right to purchase because of ownership of abutting upland and of improvements existing on the tide lands in question on and prior to March 26, 1890. In 1853, H. L. Yesler initiated a claim under the donation land act of the United States to certain land lying on the shore of Elliott bay, which was patented to him in 1876. The area so patented embraced land lying below the line of ordinary high tide, the meander line being located at half tide. In 1866, Yesler by deed of general warranty containing full covenants conveyed a strip 50 feet in width and 256 in length, being parts of

lots 2, 3, 6 and 7 of block 1 of Maynard & Yesler's plat, to the respondents. Between the premises thus conveyed and the meander line is a strip ten feet in width known, and referred to by all the parties to this proceeding, as the "gore" strip. The line of ordinary high tide crossed the premises so conveyed at a point distant some two hundred feet above the meander line thus established, so that the greater portion of the premises actually described in the deed from Yesler to the respondents was in fact tide lands. The respondents entered into possession under their deed and thereafter proceeded to improve the granted premises and also the tide lands in front thereof and extending out into the deeper waters of the bay. In the summer of 1889, while respondents were engaged in wharfing and improving a portion of the premises here in controversy, Yesler instituted an action in the territorial district court for King county to restrain and enjoin the making of such improvement, and procured a temporary injunction. In August, 1890, Yesler, certain other parties joining with him, conveyed to A. S. Dunham an area of tide lands in front of the land so patented to him, the conveyance also including the strip known, and heretofore referred to, as the "gore" strip. Thereafter Dunham conveyed the whole of said premises to the appellant. The superior court, reversing the decision of the board of state land commissioners, awarded the preference right to purchase tide lands involved in this controversy to the respondents. The findings of the court are very voluminous and respondents' right to purchase is sustained upon several distinct grounds. The suit instituted against the respondents by Yesler in 1889, terminated in a judgment made by the superior court of King county (which latter court succeeded the territorial district court upon the adoption of the constitution), and the record thereof was introduced in evidence on the trial

May, 1898.] Opinion of the Court—Gordon, J.

of this cause. From the pleadings it appears that Yesler (plaintiff therein) claimed ownership in fee of the gore strip, and consequently the right to the tide lands abutting thereon and lying westward thereof, and the respondents here (defendants therein) also claimed ownership of the same strip by reason of having occupied the same uninterruptedly from the date of the execution of the deed to them by Yesler in 1866, and because the period of limitation to recover possession of the gore strip had run in their favor prior to the institution of that action. The cause terminated in August, 1890, by entry of the following order:

“This cause coming on to be heard on final hearing in open court on the 14th day of July, 1890, the parties and their attorneys being present, after all the proofs introduced and submitted by the plaintiff, and plaintiff having rested his case, defendants move the court for judgment dismissing the action upon the pleadings and the proofs submitted, counsel for the plaintiff and defendant having been fully heard, said motion being granted;

“Wherefore it is considered, adjudged and decreed by the court that upon said proofs of the plaintiff and the said pleadings, that the temporary injunction and restraining order heretofore issued by the court in this action be and the same is hereby dissolved and that this action be dismissed and the defendants herein have and recover of and from the said plaintiff their costs and disbursements in this action taxed at . . . dollars, and that execution issue therefor.”

We think the disposition so made of that cause constituted an adjudication of the title to the gore strip, and operates as a bar and an estoppel not only as to Yesler, but the appellant claiming through him. The ultimate question in that case as in this one was and is, who owns the upland upon which these tide lands abut? We think the decision of that question in the former case concluded both

Yesler and the appellant. But to the introduction of the record of the former suit the appellant objected and here urges that it is inadmissible because not pleaded. Counsel cite *Bruce v. Foley*, 18 Wash. 96 (50 Pac. 935), decided by us November 4, 1897, in support of this contention. But the rule contended for by appellant and followed by us in that case is not, we think, applicable to the present controversy. The statute governing the trial of contests before the board of state land commissioners between adverse claimants of the right to purchase tide land does not require nor contemplate the filing of formal pleadings. Laws 1895, ch. 178, § 61, p. 554. And § 82 of the same chapter, Laws 1895, p. 562, governing appeals to the superior court from the decision of the state board provides that

“The hearing and trial of said appeal in said court shall take place *de novo* before the court without a jury, upon the pleadings so certified. The court or judge, for cause deemed satisfactory, may order the pleadings to be amended.”

Aside from this, we think that the deed from Yesler which conveyed the upland, passed to respondents littoral rights to the abutting tide or shore lands included in the gore strip, and, in connection with their possession and the disclaimer contained in § 2, art. 17 of the constitution, constitute a perfect title.

And again, the preference right of purchase is by the statute conferred upon “the owner or owners of lands abutting or fronting upon or bounded by the shore of the Pacific ocean or any bay, harbor, sound,” etc.; in other words, the upland owner. As already stated, the gore strip is not upland. It does not front upon the shore and were we to conclude that the appellant owned the gore strip it would not follow that it is entitled to the preference right to purchase these tide lands. As already

May, 1898.] Opinion of the Court — GORDON, J.

shown, Yesler conveyed the upland to these respondents, and in its natural condition the gore strip was merely tide or shore land over and across which the tide ebbed and flowed. No possible construction of the statute would admit of the right of the owner of a piece of tide land to be preferred as a purchaser of abutting tide land.

The final contention of the appellant is that, owing to the conformation of the shore line in front of the premises, the tide land, which is the bone of contention in the present case, in fact abuts upon other portions of the Yesler donation claim, and is not appurtenant to the premises owned by the respondents. We think that appellant cannot be heard to urge this contention. For upwards of twenty-five years the existing lines have been recognized both by contract and the conduct of the co-terminus proprietors. The authorities—presumably in conformity therewith—adopted these lines in laying out and platting the premises, and the lines so laid out were also adopted by all the parties to this controversy in presenting their respective applications to purchase.

In any point of view, we think the superior court reached a correct conclusion, and its judgment and decree is affirmed.

SCOTT, C. J., and REAVIS, ANDERS, and DUNBAR, JJ.,
concur.

[No. 2694. Decided May 7, 1898.]

VERMONT LOAN AND TRUST COMPANY, *Appellant*, v.
F. CARDIN *et al.*, *Respondents*.

TENANCY IN COMMON — REPLEVIN.

A surrender of mortgaged community realty to the mortgagee by the father alone would not affect the title of the children in the share inherited by them from their mother, and could give the mortgagee no better title than that of a tenant in common with the children.

A tenant in common cannot maintain an independent action of replevin for the recovery of grain raised by the tenants and in the possession of third persons.

Appeal from Superior Court, Whitman County.—Hon. WILLIAM McDONALD, Judge. Affirmed.

A. E. Gallagher, for appellant.

Mark A. Fullerton, for respondents.

Per Curiam.—This action was brought to recover a quantity of grain then in the possession of the defendants. A trial was had before the court without a jury, and the plaintiff has appealed from a judgment against it. The plaintiff held a mortgage upon the land on which the grain was raised, executed by its former owners. Said owners sold the land to one A. O. Coston, a married man, and it became the community property of himself and wife. The wife died, leaving several children, some of whom had attained their majority and some were minors. No administration was had, and Coston and his said children continued to reside upon the land, being tenants in common. After the maturity of the mortgage debt, but before a foreclosure, and while Coston and his children were residing upon the land, he, early in 1895, entered into a lease of the same from the plaintiff, whereby it was, in substance,

May, 1898.]

Opinion Per Curiam.

agreed that one-third of the grain to be grown during the life of the lease, and the title to the whole of it, until a division, should belong to and be in the plaintiff, and it covered the grain in controversy. The plaintiff was at no time in possession of the land prior to the harvesting of the grain. It could have had no constructive possession under the lease, in any event, further than as against Coston, because he could not have surrendered the rights of the children. The grain was not divided among the tenants, and it was disposed of in part to one A. Z. Coston, and in part to one Taylor, and by them deposited in the defendants' warehouse.

It is not necessary to determine some of the questions raised with reference to the validity of the lease, one being that there was no consideration for its execution. Likewise some alleged errors relating to the admission of proof will not be considered, because that which was immaterial was harmless, and that which was incompetent will be disregarded. The question of a tenant disputing the title of his landlord is not involved in the case as presented.

The most favorable claim that can be substantiated upon the part of the plaintiff is that it was a tenant in common with the children. But as such it could not independently maintain this action in replevin. *Carle v. Wall* (Ark.) 16 S. W. 293; *Titsworth v. Frauenthal*, 52 Ark. 254 (12 S. W. 498); *Phipps v. Taylor*, 15 Or. 484 (16 Pac. 171); *McArthur v. Lane*, 15 Me. 245. The plaintiff obtained no rights under the lease as against the children, and, while it contends that A. O. Coston, disposed of the entire grain, this does not appear by the record. If the children's undivided interests in the grain, or the interest of some of them therein, was transferred by them to A. Z. Coston and Taylor, they held that interest independent

of the plaintiff, and, if it was not transferred, it is still in the children. It is immaterial where it is as the case stands. There was no showing that their father had any authority to dispose of their part of it.

Affirmed.

[No. 2840. Decided May 10, 1898.]

19	306
21	281

In the Matter of the Application of ANNIE BARBEE et al., for a Writ of Habeas Corpus.

COMMITMENT TO REFORM SCHOOL — JURISDICTION OF MUNICIPAL COURT.

A municipal court being, under the constitution, an inferior court, and, under the statute, having concurrent jurisdiction with justice courts only, such municipal court has no jurisdiction to commit a child between the ages of eight and sixteen years to the reform school, but is merely authorized to send such child, when found guilty of any crime, mendicancy, vagrancy or incorrigibility to the superior court for further trial, under Laws 1891, p. 195 (Bal. Code, §§ 2721-2727), providing that when such a child is found guilty, in any court of record in this state, of any crime except murder or manslaughter, or is growing up in mendicancy or vagrancy or is incorrigible, the court may in its judgment send such child to the state reform school; and, further, if such child shall be convicted before a justice of the peace or other inferior court of any crime, mendicancy, vagrancy or incorrigibility, it shall be the duty of said magistrate to send such child, with all papers filed in his office forthwith to a judge of a court of record for further proceedings.

Appeal from Superior Court, Spokane County.—Hon. L. H. PRATHER, Judge. Reversed.

Del Cary Smith, and Fenton & O'Brien, for appellants.

John A. Pierce, Prosecuting Attorney, for respondent.

The opinion of the court was delivered by

ANDERS, J.—The appellant, R. L. Barbee, made complaint in writing under oath to the municipal court of

May, 1898.] Opinion of the Court—ANDERS, J.

Spokane, charging appellant Annie Barbee, his daughter, with incorrigibility. A warrant for the arrest of said Annie was issued upon said complaint and she was brought before the judge of said municipal court for examination, and said court thereupon heard the testimony of witnesses both in behalf of the state and said appellant and upon the evidence adduced adjudged the complaint to be sustained, and thereupon entered an order that the said Annie Barbee be committed to the state reform school at Chelalis. A copy of said order was delivered to the sheriff of Spokane county as his warrant for carrying the said Annie to said institution and he thereupon, in execution of said warrant, took her into custody. Immediately thereafter, the appellants filed in the superior court of Spokane county their petition for a writ of habeas corpus. The writ was granted returnable before the Hon. L. H. PRATHER, one of the judges of said superior court. In obedience to the writ, the said sheriff made his return to the effect that he held the said Annie Barbee by virtue of an order issued by the judge of the municipal court of Spokane committing the said Annie Barbee to the state reform school. The appellants demurred to said return and the same was overruled by the court. Thereafter the cause came on for hearing before the said superior court upon the petition for the writ, and the court, after hearing the arguments of counsel for and against the petition, rendered judgment denying the writ and remanding the appellant, Annie Barbee, to the custody of the sheriff. From this judgment and order this appeal is prosecuted. Our statute relating to habeas corpus provides that

“No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following:

1. Upon any process issued on any final judgment of a court of competent jurisdiction." 2 Hill's Code, § 722 (Bal. Code, § 5826).

The only question, therefore, to be determined is whether the municipal court had jurisdiction to make the final order committing the said Annie Barbee to the state reform school, for if it had such jurisdiction the judgment of the trial court must be affirmed. Errors and irregularities in the procedure in the trial court cannot be inquired into by habeas corpus, unless they are such as to affect the power or jurisdiction of the court to act in the case. Such matters can only be corrected by appeal or some other appropriate remedy. 9 Am. & Eng. Enc. Law, p. 227, and notes; *In re Rafferty*, 1 Wash. 382 (25 Pac. 455); *In re Lybarger*, 2 Wash. 131 (25 Pac. 1075).

The act creating municipal courts made them courts of record, and granted them jurisdiction

"1. Of any and all offenses under any ordinance of their respective cities. 2. Of all criminal offenses under the laws of the state of Washington, charged to have been committed within their respective cities, less than a felony. 3. The judges of said courts shall have all the powers of a committing magistrate as to all offenses committed within their respective cities,"

and provided that

"Wherever the jurisdiction hereby conferred may be exercised by other courts, under the constitution and laws of this state, the jurisdiction hereby conferred shall be deemed to be concurrent with such other courts." Laws 1891, p. 108 (Bal. Code, § 744).

The effect of the provision last above quoted is to give these courts concurrent jurisdiction with justice courts. And this is further shown by § 4 of the act (Bal. Code, § 746), which provides for a change of venue from the

May, 1898.] Opinion of the Court — ANDERS, J.

municipal to the proper justice court. It is claimed by the learned prosecuting attorney for Spokane county, who has filed a brief in answer to that of the appellants, that inasmuch as the act providing for the committing of juvenile offenders to the state reform school (Laws 1891, p. 195) was passed after the act declaring municipal courts to be courts of record went into effect, and confers jurisdiction to commit juvenile offenders to the reform school upon any court of record, it necessarily follows that the municipal court of Spokane was competent to make the order of which appellants here complain. This argument is based on § 1 of the act (Bal. Code, § 2721), which reads as follows:

“When a boy or girl of sane mind between the ages of eight and sixteen-years shall, in any court of record in this state, be found guilty of any crime except murder or manslaughter, or who for want of proper paternal care is growing up in mendicancy or vagrancy, or is incorrigible, and complaint thereof is made and properly sustained, the court may, if in its opinion the accused is a proper subject therefor, instead of entering judgment cause an order to be entered that said boy or girl be sent to the state reform school, in pursuance of the provisions of this act, and a copy of said order under the seal of said court shall be sufficient warrant for carrying said boy or girl to the said school, and for his or her commitment to the custody of the superintendent thereof.”

We think it will appear from a careful consideration of that section that it was the intention of the legislature to provide for committing juvenile offenders to the reform school in either of two separate and distinct classes of cases. One is where complaint is made of incorrigibility, mendicancy or vagrancy, and is properly sustained, and the other where a boy or girl of the age specified has been tried and found guilty of any *crime* except murder or manslaughter, that is, of any other crime included in the

category of felonies prescribed in the criminal statutes of the state. For instance, if the accused should be tried and found guilty of burglary, arson, grand larceny, or any other known felony, the judge of the court is vested with discretion either to sentence him or her to the penitentiary or to commit him or her to the reform school. And it is hardly to be supposed that the legislature intended to confer jurisdiction upon municipal courts to try such offenses, especially as jurisdiction of felonies was expressly withheld from such courts, as we have seen, by the act which created them. Such crimes as felonies can only be tried in the superior court and upon indictment or information. Indeed, if the legislature had by express enactment conferred jurisdiction of such offenses upon municipal courts the act would have been unconstitutional and void. *Commonwealth v. Horregan*, 127 Mass. 450. We think the words, "in any court of record in this state," must mean any court in which the crimes of murder and manslaughter, as well as other felonies, are triable. The municipal court is not such a one and we are, therefore, of the opinion that jurisdiction was not conferred upon it by this section to make the order complained of. Nor did it have jurisdiction to make such an order by virtue of any other section, or part, of the act, as we will presently see. The judicial power of this state is vested in a supreme court, superior courts, justices of the peace and such *inferior courts* as the legislature may provide. Constitution, § 1, art. 4. Municipal courts, under the constitution, are manifestly *inferior courts*, for the legislature is empowered by that instrument to provide no other. Section 2 of the act (Bal. Code, § 2722) provides that

"When a boy or girl . . . between the ages of eight and sixteen years shall be convicted before a justice of the peace or other inferior court of any crime, mendi-

May, 1898.] Opinion of the Court—ANDERS, J.

cancy, vagrancy or incorrigibility, it shall be the duty of said magistrate before whom he or she may be convicted to forthwith send such boy or girl, together with all the papers filed in his office upon the subject, under the control of some officer, to a judge of a court of record. He shall then issue an order to the parent or guardian of said boy or girl, or such person as may have him or her in charge, or with whom he or she has last resided, or any one known to be near related to him or her, or if she or he be alone and friendless then to such person said judge may appoint to act as guardian for the purposes of the cases, requiring him or her to appear at the time and place stated in said order to show cause why said boy or girl should not be committed to the said state reform school for training and reformation."

Section 3 (Bal. Code, § 2723) provides for the service by the sheriff, or other qualified officer, of the order, and § 4 (Bal. Code, § 2724) provides that

"At the time and place mentioned in said order, or at the time and place to which it may be adjourned, if the parent or guardian to whom said order may be addressed shall appear, then in his or her presence, or if he or she fail to appear, then in the presence of some competent person whom the said judge shall appoint as guardian for the purposes of the case, it shall be lawful for the said judge to proceed to take the voluntary examination of said boy or girl, and to hear the statements of the party appearing for him or her and such testimony in relation to the case as may be produced, and if upon such examination and hearing the said judge shall be satisfied that the boy or girl is a fit subject for the state reform school, he may commit him or her to said school by warrant."

Now, it is evident that the words "or other inferior court," found in § 2 can refer, so far at least as this case is concerned, to no other than the municipal court; and it will be observed that, while this court, like a justice of the peace, has jurisdiction under such a complaint as is

here under consideration, in the capacity of a committing magistrate, to send the party charged to a court of record for examination, it has no jurisdiction to make a final order in the premises committing him or her to the reform school. That power is confided solely to the superior judge.

For the foregoing reasons we are of the opinion that the judgment of the court below should be reversed and the appellant, Annie Barbee, discharged, and it is so ordered.

SCOTT, C. J., and REAVIS, DUNBAR and GORDON, JJ., concur.

[No. 2890. Decided May 10, 1898.]

MYER LEWIS, *Appellant*, v. WILLIAM BISHOP, SR., *et al.*, *Respondents*.

TAXATION — BOARD OF EQUALIZATION — ILLEGAL ACTION — REMEDIES —
WRIT OF REVIEW — SERVICE OF NOTICE BY MAIL — ESTOPPEL.

A board of county commissioners, when sitting as a board of equalization, exercises judicial functions in passing upon the valuations of property returned by the assessor; and from its decisions in such matters there is no appeal.

The action of a board of equalization in fixing the valuation of property for taxation is subject to review by the courts, under Laws 1895, p. 115, § 4 (Bal. Code, § 5741), providing for the issuance of the writ of review in cases where an inferior tribunal or board exercising judicial functions has exceeded its jurisdiction or has acted erroneously, and there is no appeal nor any speedy and adequate remedy at law.

The fact that the taxpayer has a remedy by injunction against the treasurer to prevent the sale of his property for taxes illegally assessed, in an action to foreclose the tax lien, to be instituted three years after delinquency, does not afford him such a speedy and adequate remedy as to deprive him of the right to a writ of review.

19	312
22	650
19	312
26	284
26	366
19	312
35	36

May, 1898.]

Opinion of the Court—GORDON, J.

After the assessor has returned his assessment and filed the lists and books with the clerk of the board of equalization, verified by his affidavit, as required by Laws 1897, p. 160, § 54 (Bal. Code, § 1710), he has no further power to make any corrections therein or addition thereto.

Where a board of equalization, by formal order, has proceeded to raise an assessment from \$3,600 to \$18,000, they are estopped from claiming that the assessment as returned by the assessor was in fact \$18,000.

Under Laws 1897, p. 162, § 58 (Bal. Code, § 1714), a board of equalization has no power to increase the valuation of real property, unless at least five days' notice shall have been given in writing to the owner or agent.

When the notice required by § 58, *supra*, is given by mail, the owner of real property affected by the proposed increase in valuation is entitled to ten days' notice, under Laws 1893, p. 414, § 21 (Bal. Code, § 4891), which provides that in case of service by mail the time of service shall be double that required in a case of personal service.

Where the statute requires notice to a property owner of a proposed increase in the valuation of his property for taxation, an increase without notice is void, even though the conclusion of the board may be fair and in accordance with substantial justice.

Appeal from Superior Court, Jefferson County.—Hon. J. G. McCLINTON, Judge. Reversed.

Morris B. Sachs, for appellant.

Thomas M. Fisher, for respondents.

The opinion of the court was delivered by

GORDON, J.—The appellant instituted this proceeding in the superior court for Jefferson county for the purpose of obtaining a writ of *certiorari* to review the proceedings of the board of equalization. The lower court, on final hearing, gave judgment against the plaintiff, and thereupon this appeal was prosecuted. It appears from the record that the plaintiff is a citizen of the state of California, and the owner of 18.37 acres of land known as the "Port Townsend Sawmill Property,"

and that said property was assessed for the year 1897 as follows: Land, \$1,600; improvements, \$2,000; total, \$3,600—as appears from the return of the assessor for said county filed with the clerk of the board of equalization on the 1st day of August, 1897. From the return made to the writ by the respondents it appears that the following orders were made by that board concerning this property:

“On Wednesday, August 11th, the following change in value was ordered: Myer Lewis, 18 and 37-100 acres, in section 1, township 30, range 1 W., from valuation by assessor of \$3,600 to valuation of \$9,300.”

“Clerk of board to notify Myer Lewis that notice sent him August 11th, 1897, in reference to assessment on lands in section 1, township 30, range 1 W., was in error, and that said assessment is reduced from \$18,000 to \$17,000. . . .”

On Monday, August 16th, the following proceedings were had and done:

“On motion the board reconsidered its action, taken August 11th, 1897, in the matter of the assessment of Myer Lewis on 18 and 37-100 acres in section 1, township 30, range 1 W., in which it raised the assessment on said land from \$3,600 to \$9,300; also order made August 12th, 1897, in reference to same matter. . . .”

And the following final order was made:

“Ordered by the board that the assessment of Myer Lewis on 18 and 37-100 acres in section 1, township 30, range 1 W., be raised from \$3,600 to \$17,000.”

Notice of this order was directed to be given by the clerk of the board by mail to Lewis, addressed to San Francisco, and also Port Townsend, citing him to appear on or before August 21st, to show cause why his assessment “should not be so raised.” These notices were placed in the postoffice at Port Townsend, August 17, 1897, at

May, 1898.] Opinion of the Court—GORDON, J.

about the hour of 6 p. m., and on the 21st of August the board of equalization adjourned. The lower court found that the true value of the land, according to the judgment of the assessor, was \$16,000; that after delivering the assessment roll to the board of equalization and his attention had been called to the assessment the assessor added a cipher to the \$1,600, thereby changing it to \$16,000, and also changed the total from \$3,600 to \$18,000; and further found that he intended to assess it at that sum, and had set down the figure \$1,600 in lieu thereof through inadvertence and mistake. The court further found

“that said defendants, as such board of equalization, between the 4th and 21st days of August, 1897, made several irregular and inconsistent orders in attempting to equalize the assessment, the intent and result of which was to equalize the same by leaving the valuation of said land stand at \$16,000, and by reducing the valuation placed by the assessor on the improvements thereon from \$2,000 to \$1,000, thereby reducing the total assessed valuation of said land and improvements of plaintiff from \$18,000 to \$17,000; . . . that said valuation of \$16,000 placed on said land and \$1,000 placed on said improvements were fair and reasonable, and not above the value placed upon other property in the same neighborhood and similarly situated, and that plaintiff is in no wise wronged by the action of the said board.”

Respondents have moved to dismiss this appeal, contending that the court had no authority to issue a writ of review in this case. In support of the motion to dismiss, it is urged that the board of equalization provided by § 58, ch. 71, p. 162, Laws 1897 (Bal. Code, § 1714), does not exercise judicial functions, and that § 4, p. 115, Laws 1895 (Bal. Code, § 5741), restricts the granting of the writ to cases where

“an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, . . . and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.”

In *Olympia Waterworks v. Thurston Co.*, 14 Wash. 268 (44 Pac. 267), cited by both counsel, it was held that an appeal did not lie from a decision of the board of equalization to the superior court. In the course of the opinion it was said:

“. . . . It is claimed by the water company that the equalization of the valuation is in the nature of a judicial proceeding, and within the proper jurisdiction of the courts. There are some cases which so hold, and there are others from courts of equal repute which hold directly to the contrary. But, in our opinion, it is not necessary for the purposes of this case that we should decide as to the nature of the proceeding before the board of equalization.”

The disposition of the motion in the present case involves a determination of the character of function exercised by such board, and we have become satisfied that the overwhelming weight of authority is that such boards exercise judicial functions. *Cooley*, Taxation (2d ed.), p. 422; *Hagar v. Reclamation District*, 111 U. S. 701 (4 Sup. Ct. 663); *Stanley v. Supervisors*, 121 U. S. 535-550 (7 Sup. Ct. 1234); *Stuart v. Palmer*, 74 N. Y. 183 (30 Am. Rep. 289); *State v. Jersey City*, 24 N. J. Law, 662-666; *State v. Morristown*, 34 N. J. Law, 445; *Griffin v. Mixon*, 38 Miss. 424. See authorities given in note to *Hagar v. Reclamation District*, 111 U. S. 710 (4 Sup. Ct. 670).

In further support of the motion to dismiss, it is urged that the plaintiff has a remedy against the treasurer to prevent the sale of the property, if improperly assessed.

May, 1898.] Opinion of the Court—GORDON, J.

We think, however, that the remedy which would be afforded by injunctive relief in such cases is neither speedy nor adequate, and it is doubtful if that remedy could be invoked until some actual interference was threatened. Nor does the fact that the law requires the tax lien to be foreclosed by action in court constitute a sufficient objection to the allowance of the writ. Under the present revenue act, proceedings to foreclose the tax lien cannot be instituted until three years after the 1st day of December next following the date of delinquency. Sess. Laws 1897, p. 182, § 96 (Bal. Code, § 1751). And to require the taxpayer to await the institution of an action to foreclose the tax lien before he can urge the objection to the tax would, in many cases, amount to a denial of justice, and it might often occur that it would be more to the advantage of the property owner to submit to the unjust and illegal tax than to await the institution of the action to foreclose. A tax upon real estate is a first lien upon the property (§ 78, *supra*, Bal. Code, § 1734) and its existence might interfere materially with the right of the owner of the property to dispose of or incumber it. It follows that the motion to dismiss must be denied.

Passing to the merits, the first question to be considered is the right of the assessor to alter or change the assessment after he has returned it and filed the lists and books with the clerk of the board. Laws 1897, p. 160, § 54 (Bal. Code, § 1710) requires him to file the same on or before the first Monday in August, and to verify it by his affidavit. We think that when this has been done it is beyond the power of the assessor to make any corrections therein or additions thereto. The statute nowhere authorizes him to interfere with the rolls after the same have been filed, and there are many reasons why he should not be permitted to do so. No notice of his

assessment is required to be given to the property owner. The law fixes the time when the assessor shall file in a public office his return of the assessment. That operates as notice, and affords opportunity to the property owner to ascertain what his assessment is. If satisfied therewith, he need give the matter no further consideration, unless thereafter he receives notice of any proposed increase.

The various orders made by the respondents in this case were inconsistent, but by their final order all former action in reference to plaintiff's property was rescinded, and as a substitute for former orders, and in lieu thereof, they proceeded to raise the assessment from \$3,600 to \$17,000. Respondents are not, therefore, in the position to say that the assessment as returned by the assessor was \$18,000 or anything excepting what they finally recognized it to be, viz., \$3,600.

The remaining question is, in proceeding to raise the assessment did they exceed their jurisdiction? Laws 1897, p. 162, § 58, provides:

"First. They shall raise the valuation of each tract or lot of real property which in their opinion is returned below its true and fair value to such price or sum as they believe to be the true and fair value thereof, after at least five days' notice shall have been given in writing to the owner or agent."

The so-called notice mailed to plaintiff was wholly insufficient under this statute, and amounted to no notice whatever; in fact, no effort to sustain it has been made in this court. It was not mailed until the 17th, and required the plaintiff to show cause on or before the 21st. Had it been actually served on the 17th, it would still have been insufficient, because the time afforded was but four days, when the statute entitled the plaintiff to five days' notice. But we think where such notice is given by mail it is

May, 1898.] Opinion of the Court — GORDON, J.

governed by § 21, ch. 127, p. 414, Sess. Laws 1893 (Bal. Code, § 4891) which requires:

“In case of service by mail, the papers shall be deposited in the postoffice, addressed to the person on whom it is served, at his place of residence, and the postage paid; and in such case the time of service shall be double that required in a case of personal service.”

But it is claimed by respondents that the proceedings show an honest effort to get the proper value and a fair and just assessment, and that substantial justice has been done; that there is no claim that the property was assessed at a higher rate than the adjoining property; or that the value of the improvements placed upon the land was not fair and reasonable. It is sufficient answer to say that the statute, in accord with the spirit of the constitution, contemplates that the property owner shall have a right to be heard before the value of his property as fixed by the assessor is raised, and it is no justification of the action of the respondents proceeding without notice, where notice was required to be given, to say that the conclusion reached by them was fair and accords with substantial justice. It will be time enough to determine those questions after the opportunity for hearing which the law has afforded the parties has been given. The granting of the writ in the present case is simply to place the parties in the position that they were in before the board of equalization took any action in the premises, and under such circumstances the statute affords ample provision for the correction of any mistakes that may have occurred, and makes it possible that plaintiff's property shall be charged with its just burden of taxation.

The judgment dismissing the writ must be reversed, and the cause remanded for further proceedings.

SCOTT, C. J., and ANDERS, DUNBAR and REAVIS, JJ., concur.

[No. 2932. Decided May 16, 1898.]

GEORGE M. FAULKNER, *Appellant*, v. CITY OF SEATTLE,
Respondent.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—BONDS ON SPECIAL FUND
—WATERWORKS—CHANGE OF SYSTEM—ELECTIONS.

The issuance of bonds for the construction of a waterworks system payable from a fund to be created from a certain percentage of the gross revenues of the system, would not create a debt against the city, although it might ultimately prove that the proportion of revenues from the system allowed for current expenses in its operation would be inadequate to fully meet such expenses.

The fact that a special fund, which is to be provided for the construction of a system of waterworks, is not in existence, would not make expenditures incurred on the credit of that fund and which are provided as payable therefrom, an indebtedness against the city.

The submission of a proposition to the voters of a city for an extensive addition to its system of waterworks and for a change from a pumping to a gravity system, is governed by Laws 1893, p. 12, § 2, which provides that a plan therefor may be submitted to the people and adopted by majority vote, if no indebtedness is created against the city; and such addition does not come within the purview of Laws 1895, p. 18 (Bal. Code, §§ 835-837), requiring a three-fifths vote in favor of a change of system, as the latter statute contemplates and governs changes in a system in process of construction.

Appeal from Superior Court, King County.—Hon. WM. HICKMAN MOORE, Judge. Affirmed.

W. T. Scott, for appellant.

W. E. Humphrey, and Edward Von Tobel (*John K. Brown*, of counsel), for respondent.

The opinion of the court was delivered by

SCOTT, C. J.—This action was brought to enjoin the city from proceeding with the construction of a water works

19	320
26	312
19	320
142	526

May, 1898.] Opinion of the Court—SCOTT, C. J.

improvement known as the "Cedar River Gravity System." The appeal is from a judgment sustaining a general demurrer to the complaint. In October, 1895, an ordinance was passed providing for an election to submit the question as to whether the city should make certain additions to an existing pumping system then in use and owned by the city, the proposed additions being set forth in detail, together with the proposed manner of payment for the construction thereof. The election resulting favorably to the proposed scheme, thereafter another ordinance was passed providing for the condemnation and acquisition of property for the purpose of constructing said system as outlined in the previous ordinance, and appropriating one thousand dollars to pay certain preliminary expenses. The ordinance further provided for the letting of a contract for the construction of the system and the issuance of bonds payable from a fund to be derived by setting aside 75 per cent. of the gross receipts of the system, and that the contract should contain a provision that the contractor should take all warrants issued by the city in payment of any and all real estate rights, easements, and privileges necessary to the prosecution of the work, at par. But the ordinance contained the further provision that "payment for all such real estate rights, easements and privileges shall be made from sums obtained by the sale of warrants to the contractor as hereinbefore provided by this section, or from such other funds as the city council shall provide." The contract has not been let, but the city was about to proceed to obtain rights of way, etc., preliminary thereto. The appellant contends for a reversal of the judgment on the grounds that the construction of said system would create a debt against the city and that it is indebted in an amount exceeding the constitutional limit; also because the conditions precedent provided in the ordinance

for obtaining the funds necessary for the improvement have not been complied with; and that the fund is not in existence and cannot come into existence until the completion and acceptance of the improvements, and until that time that there could be no money in the fund against which warrants could be drawn for the costs and expenses connected therewith; and also for the reason that the question was never submitted to the electors, the proposed improvements not being an addition, but being a change of system. It is conceded that bonds issued only against a fund to be created from the revenues of the system would not create a debt against the city. *Winston v. Spokane*, 12 Wash. 524 (41 Pac. 888). But it is contended in this case that under the allegations of the complaint a debt would be created because the city proposes to bind itself to devote 75 per cent. of the gross receipts to the payment of the bonds and that it further appears that the remaining 25 per cent. would not be sufficient to cover the operating expenses of the system. But, conceding this to be true, we are of the opinion that it does not appear that any debt would be created by the contract. There is no uncertainty about the proposition so far as the payment of the proposed bonds is concerned, for the ordinance expressly provides that the contractor shall have no claim against the city beyond the fund provided. It is impossible to determine at this time whether 25 per cent. of the gross receipts will be sufficient to cover operating expenses, and the allegations of the complaint in that respect can be regarded as nothing more than conclusions or estimates. Furthermore, it is not apparent, in case the operating expenses should exceed said 25 per cent., that the city could not provide for a payment thereof in some lawful manner. Of course it could not be done by issuing warrants, which would create an additional indebtedness

May, 1898.] Opinion of the Court—Scott, C. J.

against the city in excess of the limit, but it does not appear that there is any intention to do this. It is apparent that the reservation of 25 per cent. of the gross receipts for the management of the system is to be regarded as an estimate upon the part of the city, to be assented to by the contractor, as to what would be sufficient for the operation of the plant, and it might not follow that, in case it should be found insufficient, an additional amount could not be set aside or raised in some way. At any rate, the contract for the construction of the improvements is limited in every way from the creation of any debt in excess of the limit, and as far as all funds and costs are concerned it is this contract that must suffer rather than that the debt limit can be violated. It is also urged that as the fund is not now in existence and as the city is proposing to acquire rights of way and property rights prior to the creation of the fund, this would be a violation of the provision with reference to its debt limit, but that does not follow necessarily. There may be some method for immediate payment provided for property condemned, or an agreement possibly postponing and limiting payment to the fund contemplated under the contract for the construction of the works. If the city should wrongfully attempt to make payment for rights of way out of its general fund, the parties holding claims against that fund possibly could interfere, but it is not apparent that there is any intention to deplete this fund. Appellant further contends that, because the ordinance authorizes a change of system from a pumping to a gravity one, and also because of the extent of the alterations and additions, it can not be regarded as an addition merely, but is an entire change of system, and for that reason it was necessary that it should be assented to by three-fifths of all the electors voting on the proposition. But if this were conceded, it does not

appear from the complaint that three-fifths of the people voting did not vote in favor of it. Although it is alleged that the ordinance provided for the submission of the matter to a majority of the electors, this is not equivalent to an allegation that three-fifths did not vote in favor of it. However, the further claim of the respondent must be sustained, that under chapter 8 of the Laws of 1893, p. 12, a majority vote was sufficient so long as there was no provision that the city was to become indebted for the construction of the plant, and it was not under chapter 13 of the Laws of 1895, p. 18 (Bal. Code, §§ 835-837), which refers to a change in a system in process of construction.

We are of the opinion, under the facts shown, that the city might proceed with the preliminary work as is proposed, although it has not the power to issue warrants against the fund to be derived by the sale of warrants to the contractor in advance of the letting of the contract, as provision for payment may be made in some other manner, as indicated.

Affirmed.

REAVIS, DUNBAR, GORDON, and ANDERS, JJ., concur.

[No. 2857. Decided May 19, 1898.]

THE STATE OF WASHINGTON, *on the Relation of Joseph Ditmar, Respondent*, v. WILLIAM H. DITMAR, *Appellant*.

ALIMONY — FAILURE TO COMPLY WITH AWARD — DEMAND — CONTEMPT
— ATTACHMENT.

The court has power to punish for contempt for failure to comply with an order for the payment of alimony, although the decree awarding alimony may have been made a lien upon the defendant's realty.

May, 1898.] Opinion of the Court — DUNBAR, J.

A finding by the trial court that defendant is able to satisfy a decree of alimony against him is warranted when it is shown that he has been able to borrow more than double the amount of the decree to apply in other ways.

The fact that attachment did not issue against the defendant in contempt proceedings is not a matter of which he can complain, when he has voluntarily appeared in the action.

Demand upon defendant to pay a decree of alimony against him is unnecessary, prior to proceedings for contempt, when it is shown that defendant asserted he would never obey the decree.

Appeal from Superior Court, Lincoln County.—Hon. C. H. NEAL, Judge. Affirmed.

N. T. Caton, H. N. Martin, R. K. McComb, and J. C. Kleber, for appellant.

Jackson Brock, Myers & Warren, and J. A. Haight, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—On the 3d of May, 1895, the respondent procured a divorce from the appellant and in that case the court distributed the property between the respondent and appellant, and it was further decreed that appellant should also pay off the mortgage of \$500 which the parties had executed upon the homestead, which the court decreed to respondent. In May, 1897, the mortgage not having been paid off, upon the petition and affidavit of the respondent an order was issued to show cause why the appellant should not be punished for contempt. Upon the trial of this cause the court found that the defendant had the ability and means to fully pay and satisfy the said mortgage, a fine of \$1 and costs was imposed, and it was ordered that the defendant stand committed until the same was paid. It was also ordered and adjudged that the defendant (appellant here) should pay on or before the first day of October, 1897, the balance due of the \$500 mortgage.

From this judgment an appeal was brought to this court. The main contention in this case is that, inasmuch as the payment of the mortgage was secured by a lien on the property of the appellant, the enforcement of the lien was the exclusive remedy of the respondent. Several cases are cited by the appellant to sustain this contention, but we think they utterly fail to do so. The most of the cases bear no relation whatever to the question under discussion. The case of *Andrews v. Andrews*, 69 Ill. 609, seems, from the syllabus, to hold that where a decree is made a lien on land it is not proper to award an attachment for contempt for failure to pay the amount awarded. An investigation of this case, however, shows that this question was not really decided in the case, but that this was an appeal from the decree in the divorce case, and the judgment was reversed for the reason that the decree required the payments to be made in rapid succession, and because the solicitor was allowed an exorbitant fee. It is true the court says:

“We see nothing in this case rendering it necessary to call this power [referring to an attachment] into action, as the decree in behalf of complainant was made a lien on the land.”

The court, proceeding, says:

“The amount allowed by the court is so largely out of proportion to the service rendered, that we cannot but regard it as oppressive upon the defendant, in view of the amount of alimony allowed.”

The court then proceeds to hold that the whole decree was excessive, and reversed the cause with instructions to enter a decree in conformity with the opinion of the supreme court. In *Blake v. People*, 80 Ill. 11, also cited by the appellant, it is especially held that the court has power, either by sequestration of real or personal estate

May, 1898.] Opinion of the Court—DUNBAR, J.

or by attachment against the person, by fine or imprisonment, or both, in the discretion of the court, to enforce its decrees, and it is held that these remedies are cumulative. It is true that in this case the court says that the spirit of our constitution forbids that the pecuniary inability of the party, not resulting from his fraudulent conduct to produce that condition, be punished as a contempt by imprisonment, citing *O'Callaghan v. O'Callaghan*, 69 Ill. 552. And they further say that

“Where the neglect or refusal to perform the decree is not from mere contumacy, but from the want of means, the result of misfortune, not induced by any fraudulent conduct on the part of defendant, the party will be compelled to adopt some mode other than imprisonment, to enforce the decree, consistent with the practice in the courts, either by execution or other final process, or by sequestration of real or personal estate, or by the exercise of such other powers as pertain to courts of chancery, and which may be necessary to the attainment of justice.”

It will be conceded that, if it is out of the power of the party against whom the decree is entered to comply with its conditions, and this showing is made to the court, he has purged himself of the contempt. But the case cited is authority on the proposition that the remedies are cumulative, and that where other remedies exist, and the party has contumaciously refused to obey the decree of the court, he may be punished for contempt.

In the case at bar, after reading the testimony, we are not prepared to say that the appellant was not able to satisfy this mortgage, and believe that the court found the facts as they should have been found, viz., that he was able to satisfy the same. The evidence shows that the appellant here had borrowed some \$1,200 since this decree had been entered, and, if he was able to borrow money to pay his own debts or to invest in property, he was evi-

dently able to obtain the money to meet the demands of the decree. There are several other points raised in this case, but we think they are without substantial merit. A good deal is said concerning the fact that an attachment did not issue against the person of the appellant, but the appellant appeared in the action, thereby waiving the necessity of an attachment. An attachment is not for the benefit of the defendant in the action, but for the benefit of the other party. As far as the question of demand was concerned, if the court believed the testimony of the respondent, a demand was unnecessary, for the appellant had stoutly asserted that he would never obey the decree.

We think there is no merit in the appeal, and the judgment will be affirmed.

SCOTT, C. J., and ANDERS, GORDON and REAVIS, JJ.,
concur.

[No. 2891. Decided May 19, 1898.]

H. C. LYNDE, *Appellant*, v. A. S. DIBBLE, *Respondent*.

OFFICE — TRIAL OF TITLE — DISMISSAL.

Mandamus is not the proper remedy, when the title to an office is in controversy.

Where, pending the trial of an action involving the title to an office, the office is abolished, the action will be dismissed without determining the merits of the controversy.

Appeal from Superior Court, Spokane County.—Hon.
L. H. PRATHER, Judge. Appeal dismissed.

Porterfield & Rockwell, and *Feighan & Ludden*, for appellant.

Jones, Belt & Quinn, and *W. A. Lewis*, for respondent.

19	328
120	632
19	328
35	502

May, 1898.] Opinion of the Court—GORDON, J.

The opinion of the court was delivered by

GORDON, J.—The appellant instituted this action in the superior court of Spokane county to compel the respondent to surrender to him possession of the office of clerk of the municipal court of the city of Spokane, and the books, papers, seal, etc. pertaining thereto. In the lower court judgment was given for the respondent, dismissing the action, and from that judgment this appeal was taken. The office in contention was established by the legislature in 1891. Session Laws 1891, p. 111, § 12 (1 Hill's Code, § 535, Bal. Code, § 754).

The act creating the office authorized the city council to provide by ordinance for the election of a clerk "who shall hold his office for such length of time as the council may by ordinance provide, and who shall be subject to removal in the same manner as other city officers." § 12, *supra*.

On March, 1891, an ordinance was passed in which it was provided that "The term of office of the clerk of the city of Spokane Falls shall be four years, and until his successor shall have been duly appointed and qualified."

The appellant contends that this ordinance conflicts with the freeholders' charter which went into effect in April, 1891, and that respondent's term terminated on the 14th of May, 1897; that on the 9th day of July, 1897, appellant was by the mayor appointed to the office, and such appointment was approved and confirmed by the council of the city; that thereupon appellant qualified as required by law and demanded of respondent the possession of the office, and the records pertaining thereto. It further appears that the salary of such clerk is \$100 per month and that the city is a city of the first class. Respondent contends that the term of office for which he was appointed had not expired at the time of the institution

of this action, and he urges that the title of office cannot be tried in a proceeding on mandamus. We think the authorities abundantly sustain this contention, and that it is too well settled to admit of argument that mandamus is not the proper remedy where the title to an office is in controversy. *Biggs v. McBride*, 17 Ore. 640 (21 Pac. 878); *Frey v. Michie*, 68 Mich. 323 (36 N. W. 184); *Kelly v. Edwards*, 69 Cal. 460 (11 Pac. 1); *United States v. Guthrie*, 17 How. 284. But it also appears that the office no longer exists. Laws 1897, ch. 113, p. 331 (Bal. Code, § 762a), which went into effect January 1, 1898, abolished the office, and under the well settled rule in such cases this court would do no more than dismiss the action without determining the merits of the controversy. *Hice v. Orr*, 16 Wash. 163 (47 Pac. 424); *State, ex rel Coiner, v. Wickersham*, 16 Wash. 161 (47 Pac. 421). The right to salary can be readily determined in an action at law.

Dismissed.

SCOTT, C. J., and DUNBAR, REAVIS and ANDERS, JJ., concur.

[No. 2925. Decided May 19, 1898.]

THE STATE OF WASHINGTON, *on the Relation of L. S. Howlett, v. NEAL CHEETHAM, as Auditor of the State of Washington.*

REMOVAL OF STATE OFFICERS — RIGHT TO HEARING.

Under the constitutional provision that "all officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law," and under Laws 1893, p. 247 (Bal. Code, §§ 107-109), giving the governor power to remove any state officer appointed by him,

May, 1898.]

Opinion Per Curiam.

whenever he shall be satisfied that such officer has been guilty of misconduct or malfeasance in office or is incompetent, the summary power of removal is vested in the governor without right in the officer removed to notice and a hearing, whether his term of office be for a fixed or for an indefinite period.

Original Application for Mandamus.

Bogle & Rigg, for relator.

Thomas M. Vance, Ass't Attorney General, for respondent.

PER CURIAM.—The relator seeks by this proceeding to compel the state auditor to issue to him a warrant for his salary as arid land commissioner claimed to have been earned since March 25th last. He held the position under appointment of the executive and his term would not have expired by limitation until June 16, 1899, under the act, Laws 1895, p. 452. On March 25th aforesaid, action was taken by the governor as follows:

“State of Washington, Executive Department,
Olympia, March 25th, 1898.

Whereas, The State of Washington contains a large area of arid land which under the provisions of an act of congress, known as the Carey Act, and acts of the legislature of the state of Washington of 1895 and 1897, might be made productive and valuable, affording opportunity, if properly utilized according to the intent of the acts before mentioned, for settlement and cultivation, resulting in immense and incalculable advantage to the state:

Now, Therefore, I, John R. Rogers, governor of the state of Washington, being satisfied that L. S. Howlett, duly appointed and acting commissioner of arid lands has, in my judgment, been guilty of misconduct in office, do, by virtue of the power in me vested, hereby remove the said L. S. Howlett from his office as said commissioner of arid lands, and the vacancy existing by reason of such removal I do hereby fill by the appointment of Hon. O. R.

Holcomb, of Ritzville, Adams county, Washington, for the unexpired term ending June 16, 1899.

In Witness Whereof, I have hereunto set my hand and caused the seal of the state of Washington to be affixed hereto this 25th day of March, A. D. 1898.

By the governor:

J. R. Rogers.

Great seal of the state of Washington.

Attest: Will D. Jenkins, secretary of state."

And a copy was served as specified in the act under which the same was had, Laws 1893, p. 247 (Bal. Code, §§ 107-109). A question is raised as to whether mandamus is an appropriate remedy, under the showing made here. But, considering the importance of having matters of this kind speedily determined, in order that public interests may not suffer, the court, owing to the conclusion it has reached upon the merits upon the relator's own showing, passes that question and goes to the real substance of the controversy. In *State ex rel. McReavy v. Burke*, 8 Wash. 412 (36 Pac. 281) the last mentioned act was under consideration. It is contended by the relator that the holding was in his favor, on the ground that the term here is a fixed and definite one. But what was said in the opinion there with reference to the weight of authority upon the giving of notice and an opportunity to appear and defend in cases of fixed terms was as to those cases where the act did not provide otherwise. Section 3, art. 5, of the constitution is as follows:

"All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law."

The constitution left it entirely to the legislature. It is clear that the power of removal may be vested in the governor without any right of appeal, and in construing the act the court held that it provided for a removal by the governor without notice whenever he was satisfied that

May, 1898.]

Syllabus.

the incumbent had been guilty of misconduct or malfeasance in office, and that his action was not subject to the control of the courts, the intention being to provide for a summary removal of minor state officers without the delays occasioned by protracted litigation. Additional weight at this time is lent to that construction of the act by reason of the fact that several sessions of the legislature have been held since then and no change has been made. We are of the opinion that the relator was lawfully removed.

Writ denied.

[No. 2946. Decided May 19, 1898.]

19 388
235 114

OTTO BRINGGOLD, *Appellant*, v. CITY OF SPOKANE *et al.*, *Respondents*.

COSTS—WHAT ITEMS PROPER—RETAXATION—TIME FOR MOTION—
WRIT OF REVIEW.

Where, in a judgment for costs in favor of the prevailing party, the costs are taxed in blank, the failure of the losing party to move for retaxation within ten days after entry of judgment will not constitute a waiver of the right to retaxation.

Stenographers' fees for attendance at court and transcribing testimony cannot be taxed against the losing party.

The office of a writ of review being to enforce the judgment which should have been rendered by the lower tribunal, where the lower tribunal has no jurisdiction to adjudge costs the superior court would be without jurisdiction to enter judgment for the costs incurred before such lower tribunal.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

W. A. Lewis, for appellant.

A. G. Avery, for respondents:

In *certiorari* proceedings no costs are allowed unless expressly provided by statute. *People v. Board of Police*, 39 N. Y. 506; *Commonwealth v. Ellis*, 11 Mass. 465; *People v. McDonald*, 69 N. Y. 362; *Baldwin v. Wheaton*, 12 Wend. 262; *Berry v. Lowe*, 10 Mich. 9.

The opinion of the court was delivered by

DUNBAR, J.—This action was originally brought before the board of police commissioners of the city of Spokane, seeking to remove the appellant, Otto Bringgold, from his position as police officer of said city. Trial was had before the aforesaid board, and judgment therein rendered against the appellant, removing him from his position as police officer of the city of Spokane. Thereafter the appellant caused a writ of review of the superior court of the state of Washington to issue to the board of police commissioners, and upon the return of the police commissioners to the said writ and the record in the cause, a trial was had in the superior court and judgment was therein rendered restoring Bringgold to all the rights, duties, privileges, salary and emoluments of the said office as police officer of the city of Spokane; and the judgment provided that Bringgold recover of the defendants his costs and disbursements in his behalf expended, taxed by the clerk of the court at “\$. . .” This judgment was duly filed and entered in the office of the clerk of the said superior court, on the 19th day of June, 1897. On the 21st day of June, the appellant filed in the office of the clerk of the superior court his cost bill, and included in said cost bill the costs of the said superior court, and also the costs of the original trial before the board of police commissioners. On the 16th day of July the respondents filed a motion in the office of the clerk of the said superior court to retax the costs, and on the 25th day of September the motion to retax costs was heard. The court

May, 1898.] Opinion of the Court—DUNBAR, J.

sustained the motion by striking from the cost bill all of the costs of the trial of the case before the board of police commissioners, and limited the costs on the retaxation thereof to the costs incurred in the superior court, and from this order of the court sustaining the motion to retax costs this appeal is taken.

It is claimed by the appellant that the time which the law allows for retaxing the costs, viz., ten days, had expired before the motion to retax was made, and that, consequently, the respondent had waived any right that it had to retax the costs. The record, however, shows that the costs were taxed in blank. The appellant claims that this is in accordance with the custom and rules of the superior courts of this state. But no custom or rule of a superior court would warrant the perpetration of an injustice of this kind. The respondents would have a right to presume that only the legal costs would be taxed, and would have no notice whatever of the fact that the costs of a lower tribunal were to be included in the cost bill. The fact is, as shown by the record, that as soon as the costs objected to were inserted, the motion for the retaxation thereof was duly made. It is contended by the respondents that no provision having been made by our statute for the taxation of costs in *certiorari* cases, and costs being entirely statutory, no costs at all should be allowed in this case. The sum of \$22, however, was allowed by the lower court as costs in the superior court. No move was made against that amount by the respondents. Consequently the question of those costs is not properly at issue here and we will not determine it. The cost bill filed includes the following items:

“ Paid for typewriting, 500 folios, copies served. . . . \$50
Paid stenographer, 5 days’ service. 50
Paid transcribing testimony for board. 25 ”

We have repeatedly held that stenographers' and kindred fees cannot be taxed against the losing party, so that in any event the costs above enumerated could not have been allowed.

But we think the undisputed rule of law is that the office of a writ of review is to enforce the judgment which should have been rendered by the lower tribunal. It is conceded that the police commission had no jurisdiction to adjudge costs in the proceedings which were had before it. That being true, the superior court was without jurisdiction upon the review to enter a judgment for the costs incurred in the trial before the police commissioners. Its jurisdiction could only go to the extent of rendering the judgment that should have been rendered by the lower tribunal.

The court committed no error in retaxing the costs and its judgment will therefore be affirmed.

SCOTT, C. J., and ANDERS, GORDON and REAVIS, JJ., concur.

[No. 2966. Decided May 19, 1898.]

THE STATE OF WASHINGTON, *on the Relation of German Savings and Loan Society*, v. LEANDER H. PRATHER, Judge, AND THE SUPERIOR COURT OF SPOKANE COUNTY.

DUE PROCESS OF LAW—FORCIBLE ENTRY AND DETAINER—WRIT OF RESTITUTION.

Section 5534, Bal. Code, authorizing the plaintiff, upon the institution of an action of forcible entry and detainer or of unlawful detainer, to secure a writ of restitution awarding him the possession of the realty in controversy pending action, upon his giv-

May, 1898.] Opinion of the Court—DUNBAR, J.

ing bond securing the defendant for costs and damages in case the defendant should recover judgment, is not unconstitutional as being a deprivation of property without due process of law, since the statute goes no further than to provide for the temporary possession of the property pending action.

Original Application for Mandamus.

Cyrus Happy, for relator.

E. Fitzgerald, for respondents.

The opinion of the court was delivered by

GORDON, J.—The relator was plaintiff in an action of unlawful detainer pending in the superior court of Spokane county, and in that action applied to the court for a writ of restitution pursuant to the provisions of § 5534, Bal. Code. Upon hearing, the application was denied upon the ground that that section, which is § 10 of the act of 1891 (Session Laws, p. 183), was unconstitutional. Thereupon the relator instituted this proceeding for a peremptory writ of mandate to compel the respondent as judge to grant the motion of plaintiff for an order requiring the clerk of the superior court to issue a writ of restitution and to fix the amount of bond to be given by the plaintiff thereon. The sole question for our determination is whether § 5534, *supra*, is in violation of the constitutional provision that

“No person shall be deprived of life, liberty, or property without due process of law” (Wash. Const., art. 1, § 3), which is substantially the provision of the federal constitution, art. 14, § 1. The section under consideration is as follows:

“The plaintiff, at the time of commencing an action of forcible entry or forcible detainer or unlawful detainer, or at any time afterwards, may apply to the judge of the court in which the action is pending for a writ of restitution restoring to the plaintiff the property in the complaint described, and the judge shall order a writ of res-

titution to issue. The writ shall be issued by the clerk of the superior court in which the action is pending, and be returnable in twenty days after its date; but before any writ shall issue prior to judgment the plaintiff shall execute to the defendant and file in court a bond in such a sum as the court or judge may order, with two or more sureties, to be approved by the clerk, conditioned that the plaintiff will prosecute his action without delay, and will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out."

It is the contention of the respondent that the procedure provided for by this section effects an invasion of personal and property rights, and operates to arbitrarily deprive the citizen of his property without giving him an opportunity to be heard. We think the statute does not deprive defendant of his property, but merely the right to the possession of it—if he fails or neglects to give a bond—pending the suit, and unless the plaintiff prevails in the action a return of the property to the defendant must follow. That the statute does not in express terms require that the bond should so provide in nowise alters the case. It results from a judgment in defendant's favor as fully as if it was specified in the bond. The procedure under this statute is analogous to that in replevin, with this difference in the practical operation of it, that whereas in replevin the property, because of its perishable nature, cannot always be returned, under the statute we are considering the very nature of the property renders it almost certain that it can be, and in both cases the defendant is protected by the bond. We can conceive of no objection to this statute that could not be urged with equal force to the statutory action of claim and delivery, the constitutionality of which, so far as we are aware, has never been

questioned. In either case, if defendant fails to give the forthcoming bond the possession (not title) passes to the plaintiff pending the suit, and, if plaintiff fails upon the trial, the judgment should provide for its return. The most that can be said is that defendant is deprived of the temporary use of his property, upon being secured for any loss or damage that may thereby accrue, and even this he can avoid by giving the bond provided by the statute. We do not think that this procedure entails such hardship upon a defendant as requires us to hold the act unconstitutional. As was said by the court of appeals of New York in *Happy v. Mosher*, 48 N. Y. 313:

“Laws must furnish general rules, and are to be judged by their general effects and tendencies, and not by the particular mischief which, under possible circumstances, they may occasion.”

In attachment, the defendant is deprived of the use of his property and the possession of it pending the litigation. In replevin, the defendant is not only deprived of its possession but his adversary is actually put in possession of it pending the litigation. It cannot be successfully maintained that the constitutional provision under consideration distinguishes between real and personal property, and regards the one more sacredly than the other, and there is no more constitutional warrant for depriving one of his personal property than of his real property without due process of law. In proceedings under the arrest and bail act—which obtains in nearly all of the states—the defendant may be arrested and deprived of his liberty pending litigation and in advance of the judgment of any court, unless he gives security to perform the judgment. In the case of stock or cattle distrained damage feasant, it is commonly provided by statute that their possession may be withheld from the owner pending legal proceedings. Nu-

merous other instances might be mentioned in which the owner is temporarily deprived of the possession of his property pending litigation concerning it, but we think it would be going too far to conclude that he is thereby *deprived of his property* within the meaning of the constitutional provision. Sec. 5539, Bal. Code (2 Hill's Code, §561), provides for a jury in cases arising under this act, as in other law actions, and our conclusion is that the section in question does not conflict with the constitution. No adjudications under similar statutes have been called to our attention, but upon principle the conclusion we have reached is sustained in *Happy v. Mosher, supra*; *Mehlin v. Ice*, 56 Fed. 12; *Randall v. Kehler*, 60 Me. 37 (11 Am. Rep. 169); *Montana Co. v. St. Louis Min. Co.*, 152 U. S. 160 (14 Sup. Ct. 506).

The writ will issue as prayed.

SCOTT, C. J., and DUNBAR and ANDERS, JJ., concur.

[No. 2881. Decided May 20, 1898.]

19	340
137	615

MARY J. ANDERSON, *Administratrix, Respondent*, v.
NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*.

APPEAL — BRIEFS — ALTERING STATEMENT AFTER SETTLEMENT — NEGLIGENCE — DANGEROUS PREMISES — TRESPASS.

A brief filed irregularly and out of time by one not an attorney of record in the case will be stricken from the files.

Where a statement of facts as filed, served and settled, contained an exception to an erroneous instruction, and it was a disputed question as to whether the exception had been taken, the action of the court in granting a motion several months after settlement to strike the exception was unwarranted, when there was no showing of fraud respecting the insertion of the exception.

One who goes upon the land of another on a dark and stormy night, with knowledge of an exposed pit thereon, and is injured by falling into the pit, which was located at a point more than fifty feet from the customary path across the premises, is chargeable with such negligence as to bar recovery on his part.

Proof that plaintiff's intestate was found at the bottom of a pit five feet deep, on the morning following a dark and stormy night, severely injured (apparently by a fall), and unconscious, dying shortly after as a result of his injuries, and there was blood upon one of the stone walls of the pit, where his head had evidently struck, is sufficient, after verdict, to establish the fact that his death was caused by falling into the excavation.

One who goes upon the land of another after notice to keep off, is a trespasser, regardless of the purpose for which the notice was given, as such notice is sufficient to rebut any presumption of license.

Appeal from Superior Court, Lincoln County.—Hon. C. H. NEAL, Judge. Reversed.

Stoll, Stephens, Bunn & Macdonald, and *D. J. Crowley*, for appellant.

N. T. Caton, and *Mount & Merritt*, for respondent.

The opinion of the court was delivered by

SCOTT, C. J.—This action was brought by the plaintiff to recover damages of the defendant for the death of her husband. Before argument on the merits a motion was made by respondent to strike an additional brief filed by one of the general attorneys for the company, but who was not an attorney of record in the case. The brief having been filed irregularly and out of time, the motion to strike was granted. Also, the appellant moved to strike several orders made by the court some months after the settlement of the statement of facts, granting a motion to strike therefrom an exception to one of the instructions. The statement was filed and served in January, 1898. No amendments having been proposed, after the lapse of time

provided therefor the statement was settled accordingly. It is conceded that the exception to the instruction was contained in the statement as filed, served and settled, but it was contended by the respondent that it was not in fact taken at the time of the trial. This was disputed by the appellant. The instruction related to the measure of damages and is conceded to have been erroneous. The statement was prepared under the direction of counsel who did not try the cause. There being no fraud claimed or shown, and it being a disputed question as to whether the exception was taken, considering the regularity of the settlement the court was of the opinion that the exception should stand, and the motion to strike the subsequent orders was granted.

The verdict recovered was in the sum of \$30,000 and was largely excessive. The deceased was not a skilled workman, but an ordinary laborer forty-two years of age, and had not earned at any time to exceed \$50 per month, and that as a railroad laborer. At the time of his death, and for some time previous thereto, he was working in a saloon at \$30 a month. Were it only a question of excessive damages and no error of law, the court might have followed the plan sometimes adopted of allowing the plaintiff to elect to take a lesser sum; but there are other and more important questions raised, going to the right of the plaintiff to recover at all, and it will be necessary to make a fuller statement of facts.

The defendant was the owner of an irregular tract of land of some extent near the business portion of the city of Sprague, which had been used by it as a yard and site for its railroad shops. In the summer of 1895 the shops were destroyed by fire and temporary structures built, which were used for some time and then removed and the yards abandoned except for a pump house. The property was

May, 1898.]

Opinion of the Court — Scott, C. J.

unfenced and persons were in the habit of crossing it on the way between their homes and the business portion of the city. In this plat of ground was a pit five feet deep, six feet wide and from eight to eleven feet long, left exposed, which had been formerly used by the company in cleaning its engines. Its use was discontinued some months previous to the injury, which happened on the 24th of March, 1897. The sides of the pit had been walled up with stone. The night of the 24th of March was a dark and stormy one, and the evidence went to show that the deceased, in going from the place where he was at work to his home on said night, fell into this pit, striking his head against the opposite wall, resulting in injuries which soon caused his death. It is contended by the appellant that the proof was insufficient to show that the deceased came to his death in this manner. It was proved that he was found in the pit next morning, severely injured, apparently by a fall, and unconscious, there being blood upon the wall where evidently his head had struck. In support of the verdict, we think the evidence was sufficient to show that his death was caused in the manner indicated. It is also conceded that the deceased was not upon the defendant's premises in consequence of any business he had with the defendant, but crossed the same purely for his own purposes and convenience. One of the defenses was that the deceased was guilty of contributory negligence in endeavoring to cross the tract in question on such a dark and stormy night that he was unable to see the excavation. It is also conceded that deceased knew of this excavation when it was in use by the company, but it is contended that there was nothing to show that he knew it was there at the time of his death. It also appears from the undisputed testimony that persons in crossing this tract were in the habit of following certain paths and that the nearest

path to this pit was some fifty-five feet distant at its nearest point.

We are of the opinion that this case falls clearly within the principle of many others decided by this court, where no recovery was allowed as a matter of law. It having been shown that the deceased had knowledge of the excavation as aforesaid, and it also appearing that he had been in the habit or had frequently crossed the tract in question up to the time of the injury, and the pit being open and exposed and nothing to prevent its being seen, at least when near it, it must be presumed that he had knowledge of its existence and was chargeable with negligence in attempting to cross when it was so dark that he could not see the pit or follow the paths which had been used by people in crossing the tract.

Another defense urged against the right of plaintiff to recover was that deceased was a trespasser upon the tract and had been warned by the agents of the company to keep off from it and not to cross it. It is conceded that notice to this effect had been given him, but it is contended that these warnings, with one exception, which will be noticed later, were given soon after the property was destroyed by fire or its use discontinued, which was some months previous to the injury, and it is contended that they were given only for the purpose of protecting the company's property from being stolen. Notices were posted, warning all people to keep off of the premises, and many of them, including the deceased, had been told personally to keep off. The respondent contends that, as it appears that the purpose of the company in giving these notices was to protect its property from theft, it conveyed no notice to the deceased that there was any danger in crossing the tract, and that, in any event, the defendant was liable for suffering the pit to remain exposed. There was testimony

by one witness that a warning had been given to the deceased a short time before the injury, to keep off the premises, but it is contended by the respondent that this witness was contradicted or impeached and the jury were justified in disbelieving him, and we accept that contention, as in passing upon these grounds only the conceded or undisputed facts will be considered. We are also of the opinion that it was the duty of the company, upon abandoning and discontinuing the use of the pit, to have either filled it up or inclosed it in such a manner that a person would not be likely to fall therein, but that this would only hold good as to persons who had no knowledge of the existence of the pit and who had not been personally warned of the intention and desire of the company to exclude people from the tract. Respondent contends that it was the only convenient way, during times of high water, such as existed at the time of this injury, for the deceased and many others to reach their homes from the business portion of the town, and that they were permitted to use it at such times, but no permission was shown further than that there may have been no forcible resistance. The people who did cross it, did so in spite of the notices. There was no obligation upon the railroad company to provide them a way, and if they saw fit to make use of the defendant's property, after having been personally notified to keep off of it, they did so at their own risk. Nor was the fact material as to what induced the company to give the notice. It was effectual to rebut the presumption of a license, regardless of the purpose for which it was given. These facts clearly distinguish the case from that of *Rowe v. Ballard*, ante, p. 1 (52 Pac. 321), and *Roth v. Union Depot Company*, 13 Wash. 525 (43 Pac. 641); for here actual knowledge of the existence of the pit was shown and also a notice to a person capable of understanding it to keep off of the tract in question.

The motion of the defendant for a directed verdict in its favor should have been granted. The judgment is reversed and the cause remanded with instructions to render judgment for the defendant.

GORDON and DUNBAR, JJ., concur.

ANDERS and REAVIS, JJ., concur in the result.

[No. 2916. Decided May 20, 1898.]

JOHN WINTERS *et al.*, Respondents, v. GRAY'S HARBOR
BOOM COMPANY *et al.*, Appellants.

APPEAL — JOINDER IN NOTICE — JURISDICTION OF APPEAL.

Where a party to an action appeals without serving notice upon his co-defendants, the action of the parties not served in later joining in the appeal bond, but neglecting to join in the appeal by statement filed with the clerk or to serve an independent notice of appeal, will not confer jurisdiction upon the supreme court, under Laws 1893, p. 121, § 5 (Bal. Code, § 6504) governing notice in cases where parties similarly affected desire to appeal.

Appeal from Superior Court, Chehalis County.—Hon. CHARLES W. HODGDON, Judge. Appeal dismissed.

N. W. Bush, for appellants.

George D. Schofield, for respondents.

PER CURIAM.—From a judgment in plaintiff's favor the Gray's Harbor Boom Company, one of the defendants, gave notice of appeal. The notice was not served upon its co-defendants, Burrows and Stockwell, who had appeared in the action. Thereafter the last named defendants joined in the appeal bond but did not serve an independent notice of appeal or join in the appeal by filing with the clerk of the superior court a statement to that effect.

May, 1898.] Opinion of the Court—GORDON, J.

Laws 1893, p. 121, ch. 61 § 5 (Bal. Code, § 6504). Respondents have moved to dismiss, basing their motion upon the facts already stated. We have repeatedly held that the notice of appeal is jurisdictional and cannot be dispensed with, and the court can only obtain jurisdiction when the statute on the subject of appeals is complied with. The motion to dismiss must be granted.

[No. 2934. Decided May 20, 1898.]

Z. COLBY, Appellant, v. C. F. BACKUS, Respondent.

**DUE PROCESS OF LAW—IMPRISONMENT FOR DEBT—COSTS AGAINST
COMPLAINING WITNESS.**

A statute authorizing a justice of the peace to adjudge costs against a complaining witness in a prosecution for misdemeanor and order his imprisonment until paid, in case the trial results in the acquittal of defendant and the court finds the complaint was frivolous and without probable cause, is not unconstitutional on the ground that it deprives a person of his liberty and property without due process of law.

A statute authorizing the imprisonment of the complaining witness in a malicious prosecution until payment of the costs of the action imposed upon him by the justice as a penalty, is not in violation of the constitutional inhibition against imprisonment for debt, as such constitutional provision relates only to liabilities arising on contract.

Appeal from Superior Court, Spokane County.—Hon. WM. E. RICHARDSON, Judge. Affirmed.

Danson & Huneke, for appellant.

John A. Pierce, for respondent.

The opinion of the court was delivered by

GORDON, J.—Appellant was the complaining witness in a prosecution instituted before the respondent, a justice

of the peace of the county of Spokane, in which certain parties were charged with trespass. The trial resulted in the acquittal of the defendants therein, and the court, having found that the complaint was frivolous and without probable cause, ordered and adjudged that the complaining witness (appellant here) should pay the costs. Thereafter appellant obtained a writ of review from the superior court and on a hearing had thereon the judgment and order of the justice was affirmed. From that decision this appeal was taken.

Appellant contends that § 1588, 2 Hill's Code (Bal. Code, § 6700), and § 3050, 1 Hill's Code (Bal. Code, § 1627) are unconstitutional; first, because they operate to deprive a person of his liberty and property without due process of law; and second, because they allow imprisonment for debt. As to the first contention, the decisions upon similar statutes are conflicting, some courts upholding and others denying their validity. In the following cases the statute was considered constitutional: *In Re Ebenhack*, 17 Kan. 618; *State v. Donnell*, 11 Iowa, 452; *State v. Darr*, 63 N. C. 516; *Lowe v. Kansas*, 163 U. S. 81 (16 Sup. Ct. 1031); *State ex rel McCaslin v. Smith*, 65 Wis. 93 (26 N. W. 258).

To the contrary, see: *State ex rel McGraw v. Ensign*, 11 Neb. 529 (10 N. W. 449).

The provision of our state constitution is identical with that of the federal constitution in relation to due process of law, and we think that the conclusion reached by the supreme court of the United States in *Lowe v. Kansas*, *supra*, is authoritative and should be followed by us. The statute which is assailed in the present case is almost identical with that of Kansas, which was passed upon by the federal court, and we shall not attempt to enlarge upon the decision in that case.

May, 1898.]

Syllabus.

As to the second objection, viz., that it has the effect of imprisoning the complaining witness for debt, it was said by the supreme court of Kansas in *In re Ebenhack*, *supra*:

"These costs are cast upon him as a penalty—they do not constitute strictly and simply a debt, in the technical sense of the word, any more than the fine imposed upon a party convicted of assault and battery, is a debt."

The imprisonment which is forbidden by the constitution, art. 1, § 17, relates to liabilities arising on contract. *In re Wheeler*, 34 Kan. 96 (8 Pac. 276), and the numerous authorities there cited. See, also, *In re Boyd*, 34 Kan. 570 (9 Pac. 240).

Affirmed.

SCOTT, C. J., and ANDERS and DUNBAR, JJ., concur.

[No. 2883. Decided May 21, 1898.]

MAJOR JULIUS VON SCHRADER *et al.*, Respondents, v.
HANNAH M. WELCHER *et al.*, Appellants.

APPEAL — BRIEFS.

A failure of appellant to conform with the supreme court rule as to dimensions of briefs is ground for striking his briefs, when his reply brief is as objectionable as his opening brief, though his attention was called to the matter by respondent, and no excuse is offered for the violation of the rule.

Appeal from Superior Court, Cowlitz County.—Hon. A. L. MILLER, Judge. Appeal dismissed.

M. E. Billings, for appellants.

W. F. Magill, for respondents.

PER CURIAM.—A motion is made to strike the briefs of the appellants in this case and dismiss the appeal, for the reason that Rule 8 of this court, in relation to the size of briefs, has been violated. This rule was made for convenience in binding the briefs and ordinarily a motion to dismiss would not be granted. But the appellants' briefs in this instance showing such a flagrant violation of the rule, and it further appearing that, after having their attention called to this matter by the respondents' brief, a reply brief was filed which is as objectionable as their opening brief, and no excuse whatever being offered for the violation of the rule, the appellants' briefs will be stricken and the appeal dismissed.

[No. 2907. Decided May 21, 1898.]

WILLIAM N. DICKEY, *Respondent*, v. NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*.

INJURIES TO STOCK—ABSENCE OF FENCES—PLEADING AND PROOF—
CONTRIBUTORY NEGLIGENCE.

In an action against a railway company for killing stock, in which the only allegation of negligence set out in the complaint was the negligent operation of defendant's train upon its right of way, plaintiff cannot introduce proof that the right of way was not fenced, in order to establish negligence, under the rule that the evidence must correspond with the pleadings and be restricted to the issues.

Under Laws 1893, p. 418, § 1 (Bal. Code, § 4332), providing that, in actions against railways for injuries to stock by collision with moving trains, the absence of fences is *prima facie* evidence of negligence, the fact that the track was unfenced would raise a mere presumption of negligence, which would be rebutted by proof that the train was running at a lawful rate of speed, equipped with the customary appliances, and that the stock when seen were so close that the train could not be stopped in time to avoid striking them.

May, 1898.] Opinion of the Court — GORDON, J.

One who turns a band of horses loose in a small field, fenced on all sides except the one adjoining a railway track, and takes no steps to prevent their getting in the way of passing trains, is guilty of such contributory negligence as to bar his recovery for injuries to his stock from a collision with a moving train.

Appeal from Superior Court, Spokane County.—Hon. WM. E. RICHARDSON, Judge. Reversed.

Stoll, Stephens, Bunn & Macdonald, for appellant.

Norman Buck, and *C. W. Hoyt*, for respondent.

The opinion of the court was delivered by

GORDON, J.—Action to recover damages for negligently killing plaintiff's horses. The complaint after alleging the incorporation of the appellant, proceeds as follows:

"That in the county of Spokane and state of Washington on or about the 25th day of May, 1897, the defendant, while negligently operating its train upon its right of way near the Idaho boundary line, did carelessly and negligently kill the following described horses belonging to the plaintiff;"

then follows the description, allegation of value and prayer for judgment. The answer was a general denial, coupled with a defense that, if the horses were killed, they

"were killed through the negligence and carelessness of said plaintiff, in that the said plaintiff negligently and carelessly turned said horses loose in the immediate proximity of the railway track of the defendant without placing any person to guard or control or to watch said horses."

There was a verdict for plaintiff, and the defendant has appealed. From the record it appears that the plaintiff, who was traveling from Colfax, Washington, to Coeur d'Alene, Idaho, with five horses, had camped for the night at a place distant about 375 feet from appellant's track, in a triangular tract or field containing about five acres. Two sides of the field were fenced; there was also a fence

along the right of way on the north side of the railway, but that portion on the south side of the railway track was unfenced. The track at that point runs east and west; the respondent camped on the south side. Having secured permission from the owner of the premises, respondent went into camp about sundown and turned his horses loose to graze. He testified that he knew the condition of the premises with reference to the fences, and that it was a dangerous place; that after turning the horses out he kept between them and the track until about 8 o'clock, when some one informed him that there would be no more trains that night, and thereupon he went to bed. Three of the horses were killed by a west bound freight which passed the point at or about 11 o'clock at night.

Upon the trial the court, over appellant's objection, permitted the introduction of testimony showing that the railroad was not fenced on the south side of the tract at the point where the horses were killed. Error is predicated upon the ruling of the court in that regard. Sec. 1, ch. 128, Session Laws 1893, p. 418 (Bal. Code, § 4332), is as follows:

"That in all actions against persons or corporations owning or operating steam railways in the state of Washington, for injuries to stock of any kind, except hogs, by collision with moving trains, it shall be *prima facie* evidence of negligence on the part of the defendant to show that the railroad track was not fenced so as to turn said stock from the track."

Appellant contends that there is no allegation in the complaint which brings the case within the provisions of this section—that the only negligence complained of is in operating its train. We think the evidence should have been excluded. The evidence did not relate to the cause of action set out. Respondent urges that § 1, *supra*, "establishes a rule of evidence which makes the absence

May, 1898.] Opinion of the Court—GORDON, J.

of a fence evidence of negligence." With this we agree, but it is not evidence of the negligence set out in the complaint, and it is elementary that the evidence must correspond with the allegations and be restricted to the issue.

At the trial the defendant introduced the engineer, conductor and other employees in charge of the train, who testified that at the time of the accident the train was proceeding at the ordinary and usual rate of speed, that the locomotive and cars were equipped with air brakes and appliances for stopping trains, that it was properly officered by competent and skilful employees who were at their proper stations, that the horses when discovered were between the track and the fence on the north side—distant about four or five car lengths—and were not, and could not have been, seen in time to permit the train to be stopped and the accident averted; that every effort was made to avoid the collision after the horses were discovered. Based upon this testimony defendant proffered a request for the following instruction:

"You are further charged that if the train was running at a lawful rate and had the customary appliances, and the stock when seen by the engineer, or might with due care on his part have been seen, were so close that the train could not be stopped in time to avoid striking the stock, then you will find for the defendant."

This or a similar instruction should have been given. If the jury found the facts as embraced in this instruction, then the presumption of negligence was overcome and plaintiff was not entitled to recover. *Louisville & N. R. R. Co. v. Wainwright*, 3 Bush, 149; *Volkman v. Chicago, etc., Ry. Co.*, 35 Am. & Eng. R. R. Cases, 204 (37 N. W. 731); *Chicago, etc., R. R. Co. v. Packwood*, 59 Miss. 280; *Durham v. Wilmington & W. R. R. Co.*, 82 N. C. 352. The

fact that the tract was not fenced upon the south side—even assuming that plaintiff was entitled to show that fact—raised a mere presumption of negligence. If the statute was given any other construction, it would be void as imposing a penalty when no duty existed—a taking of property without due process of law. See *Jolliffe v. Brown*, 14 Wash. 155 (53 Am. St. Rep. 868, 44 Pac. 149), in which case we had occasion to pass upon this statute.

We also think that the testimony of the plaintiff fully established the fact that he was guilty of such negligence as directly contributed to the injury of which he complained. Here was a small field, fenced in on all sides excepting that adjoining a railway track. On the opposite side of the track there was also a fence. To turn a band of horses loose in such a place without taking any steps to prevent their going upon the track and in the way of passing trains must be held in law such negligence as will prevent a recovery. Under such circumstances, it was only to be expected that the horses would stray upon the track and in the way of passing trains.

“A man who willingly abandons his property to destruction, or purposely exposes it to known danger, has no right, either in law or morals, to invoke the assistance of the courts of justice to secure pay for it.” *Welty v. Indianapolis & V. R. R. Co.*, 105 Ind. 55 (4 N. E. 410).

See, also, *McDonald v. Great Northern R. R.*, 46 Pac. (Idaho) 766; *Peterson v. Wisconsin Central R. Co.*, 86 Wis. 206 (56 N. W. 639); *Ft. Wayne, etc., R. R. Co. v. Woodward*, 112 Ind. 118 (13 N. E. 260); *Carey v. Chicago, M. & St. P. Ry. Co.*, 61 Wis. 71 (20 N. W. 649); *Nieman v. Michigan Central R. Co.*, 80 Mich. 197 (44 N. W. 1049). Appellant's request for a peremptory instruction should have been granted.

May, 1898.] Opinion of the Court—DUNBAR, J.

The cause must be reversed and remanded with direction to enter judgment for the defendant.

SCOTT, C. J., and DUNBAR and REAVIS, JJ., concur.

[No. 2850. Decided May 23, 1898.]

ETTA D. LEE, *Respondent*, v. WILLIAM LEE, *Defendant*,
STATE OF WASHINGTON, *Appellant*.

DIVORCE—INTERVENTION BY STATE—RIGHT OF APPEAL.

The state has no right of appeal from the judgment in a divorce proceeding, which was resisted by the prosecuting attorney under authority of the statute providing for his interfering in divorce cases whenever the complaint remains undefended.

Appeal from Superior Court, Kittitas County.—Hon.
JOHN B. DAVIDSON, Judge. Appeal dismissed.

Kirk Whited, Prosecuting Attorney, for appellant.

Graves & Englehart, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is an appeal by the state from a judgment of the court decreeing a divorce, and the respondent moves to dismiss the appeal and affirm the judgment of the superior court, for the reason that said appeal is not taken by any party to the action, nor by any party or person authorized to appeal from the said judgment and decree of the superior court, and that no bond on appeal has been executed by any appellant as required by law. We think this motion must be sustained. Section 6500 of Ballinger's Code (Laws 1893, p. 119, § 1) provides that, "any party aggrieved may appeal to the supreme court in the mode prescribed in this title from any or every of

the following determinations, and no others, made by the superior court, or a judge thereof, in any action or proceeding." Then follow the cases in which an appeal may be taken. We do not think that the law contemplates an appeal in a case of this kind. The law prescribes, it is true, that, whenever a complaint for divorce remains undefended, it shall be the duty of the prosecuting attorney to resist such complaint. The sole object of the law in directing the prosecuting attorney to interfere in a case between individuals is to prevent a collusion between the parties and the obtaining of a judgment by the court fraudulently, and when that appearance has been made and the superior court has been protected by such appearance, the object of the law has been met and the state has no further interest in the matter. The state is in no sense a party to the action and cannot be aggrieved by the action or judgment of the superior court, if the court has acted advisedly in the premises.

We think no appeal lies to this court in an action of this kind, and the motion to dismiss will, therefore, be granted.

SCOTT, C. J., and GORDON and REAVIS, JJ., concur.

[No. 2877. Decided May 23, 1898.]

ADAMS COUNTY, *Respondent*, v. FERD DOBSCHLAG *et al.*, *Appellants*.

EMINENT DOMAIN — COSTS IN CONDEMNATION PROCEEDINGS — CONSTITUTIONAL LAW.

Section 17, Laws 1895, p. 88 (Bal. Code, § 3787), providing that when condemnation proceedings are instituted against any person to whom tender has been made, and such person shall fail to recover judgment for a greater sum than the amount tendered,

May, 1898.] Opinion of the Court—DUNBAR, J.

all costs of such condemnation proceedings shall be taxed against him, is void, since it is in conflict with art. 1, § 16, of the constitution, which provides that private property shall not be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner; for the reason that under such constitutional guaranty costs cannot be taxed against a non-consenting owner in condemnation proceedings.

Appeal from Superior Court, Adams County.—Hon. C. H. NEAL, Judge. Reversed.

D. H. Hartson, for appellants.

O. R. Holcomb, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This appeal arises out of certain proceedings in the lower court on a petition by the county attorney of Adams county to said court to condemn certain lands, the property of, and belonging to, appellants, situated in said county, for a public road. The petition was made and the proceedings had under the road law of 1895 (Laws 1895, p. 82; Bal. Code, § 3771 *et seq.*), providing for viewing, laying out, surveying, and establishing county roads. The county commissioners of Adams county tendered the amount found by them to be due the appellants as damages, which amount was refused by the appellants, who appeared in the proceedings, of which they had notice, filed their objections thereto, and demurred to the petition on the ground that the same did not state facts sufficient to constitute a cause of action, and that the act pleaded therein (said road act of 1895) was unconstitutional. The demurrer was overruled, the jury was waived, and the court assessed the damages. Testimony was introduced by both parties, and the court gave judgment to appellants in the sums of \$35 and \$70, respectively, as damages, the value of the said land appropriated, and entered judg-

ment against appellants condemning said land for said county, and assessing the costs of said proceedings against appellants.

It is contended by the appellants that the court erred in its findings of fact, and that the proof does not sustain the fact found that the road established was of public use. We have read the testimony adduced at the trial, and, without especially commenting upon it, are satisfied that it sustains the facts found by the court. We are also satisfied with the validity of the law in question, and do not think any of its provisions are obnoxious to the constitution, or to anything that has been said by this court in any of the cases cited by appellants, with the exception of § 17 of said law, which provides that:

“When condemnation proceedings are instituted as heretofore provided against any person to whom tender has been made, and such person shall fail in such proceedings to recover judgment for a greater sum than the amount so tendered him, all costs of such condemnation proceedings shall be taxed against such non-consenting owner.” *Sess. Laws 1895, p. 88 (Bal. Code, § 3787.)*

This provision, it seems to us, is in conflict with § 16 of article 1 of the constitution, which provides that

“No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner.”

It was held by this court in *Peterson v. Smith*, 6 Wash. 164 (32 Pac. 1050) that under the constitutional guaranty the owner of the land could not be compelled to present a claim for damages; that he could remain quiet, and be assured that, before his property was condemned, the county must ascertain his damage, and either pay it to him, or pay it into court for his benefit; and the amount of his damages must be ascertained in a court, in a pro-

May, 1898.] Opinion of the Court—DUNBAR, J.

ceeding instituted for that purpose, and in which the defendant could appear and make his showing, if he so desired. In this case the finding of the commissioners that the damages to the appellants were a certain sum does not meet the requirements of the constitution, as construed in the case above cited. The proceeding instituted for the purpose of determining this damage was the proceeding in the superior court, and not the proceeding before the county commissioners, and the landowner must not be put to the expense of litigation in order to preserve his constitutional right to have the amount of damages determined by a court in a proceeding to which he is a party. We appreciate the argument advanced by the respondent that the owner whose land is sought to be subjected to the use of the public will be encouraged under such a construction of the constitution always to litigate the question of damages, and to refuse the amount tendered, for the reason that he will be held harmless so far as costs are concerned; but we think the plain provisions of the constitution prohibit us from entering into a consideration of public policy in this connection. The judgment will therefore be reversed, and the cause remanded, with instructions to the lower court to modify the judgment to the extent of taxing the costs to the county. The appellants will recover the costs of this appeal.

SCOTT, C. J., and GORDON and REAVIS, JJ., concur.

[No. 2938. Decided May 23, 1898.]

S. E. DE RACKIN, *Appellant*, v. COUNTY OF LINCOLN,
Respondent.

CONTRACT FOR PUBLICATION OF DELINQUENT TAX LIST.

Under Laws 1893, p. 366, § 96, authorizing the county treasurer to enter into a contract for the publication of the delinquent tax list, a newspaper publisher who has published such delinquent tax list under contract with a county treasurer is entitled to have his claim therefor allowed by the county commissioners, provided the cost does not exceed the sum of thirty cents for each description.

Appeal from Superior Court, Lincoln County.—Hon.
C. H. NEAL, Judge. Reversed.

W. H. Plummer, and *W. J. Thayer*, for appellant.

Jackson Brock, and *Mount & Merritt*, for respondent.

The opinion of the court was delivered by

GORDON, J.—Appellant entered into a contract with the treasurer of the respondent county to publish the delinquent tax lists for the years 1892 and 1893. Thereafter he presented his claim to the board of commissioners for allowance, and subsequently brought this action. An issue of fact was joined but at the trial an objection in the nature of a demurrer *ore tenus* was sustained and the plaintiff, electing to stand by his complaint and refusing to amend, has appealed.

It is agreed by counsel that the only question involved is the right of the treasurer to make the contract. We regard the question as settled by the decision of this court in *State ex rel. Whatcom County v. Purdy*, 14 Wash. 343 (44 Pac. 857). In that case the commissioners of Whatcom county had entered into a contract with the publisher

May, 1898.]

Argument of Counsel.

of a certain newspaper to publish the delinquent list. The treasurer of the county had also entered into a contract with a different publisher for the same purpose, and the sole question for determination there was, which contract should be sustained. We think that § 96 of the revenue act of 1893, Session Laws, p. 366, authorizes the treasurer to enter into a contract for the publication of the tax list, the only limitation upon his authority being that the cost shall not exceed the sum of thirty cents for each description.

The judgment will be reversed and the cause remanded for further proceedings in accordance herewith.

SCOTT, C. J., and DUNBAR and REAVIS, JJ., concur.

[No. 2951. Decided May 23, 1898.]

ALAN R. BLACKBURN, *Appellant*, v. WASHINGTON GOLD
MINING COMPANY *et al.*, *Respondents*.

BILL OF PARTICULARS—WHEN GRANTABLE.

The defendant is not entitled to a bill of particulars when its only office would be to make plaintiff disclose the specific evidence upon which he relies for a recovery.

Appeal from Superior Court, Spokane County.—Hon.
LEANDER H. PRATHER, Judge. Reversed.

Graves, Wolf & Graves, and *A. J. Laughon*, for appellant:

It is not the office of a bill of particulars to apprise the defendant of plaintiff's evidence. It is the office of such a bill, however, to apprise them of the nature and extent of the cause of action, and that is its only office. We

submit that the only purpose of this application is to get from plaintiff the evidence he intends to use on the trial. This practice should be condemned. *Van Olinda v. Hall*, 31 N. Y. Supp. 495; *Morrill v. Kazis*, 40 N. Y. Supp. 954; *Roberts v. Cullen*, 16 N. Y. Supp. 517; *Newell v. Butler*, 38 Hun, 104; *Garfield v. Paris*, 96 U. S. (24 Law. ed.) 557. A party is not entitled to the particulars as a matter of course. He must make some showing of his inability to meet the allegations of the complaint, or that the particulars are without his knowledge, before he is entitled to the bill. *Wales Mfg. Co. v. Lazzaro*, 43 N. Y. Supp. 1110; *Carrillo v. Carrillo*, 6 N. Y. Supp. 305; *Sawyer v. Bennett*, 18 N. Y. Supp. 24.

Jones, Voorhees & Voorhees, Feighan & Ludden, and *Albert Allen*, for respondents:

The only question to be considered by this court is: Was the granting of the motion for a bill of particulars within the sound judicial discretion of the trial court? Bal. Code, § 4930; *Turner v. Great Northern Ry. Co.*, 15 Wash. 213 (55 Am. St. Rep. 883).

In the class of cases within which the case at bar falls, justice demands that the generality of the pleadings be so limited by a bill of particulars as to confine the proof to the particulars therein. *Jutsum v. Bricklayers', etc., Union*, 29 N. Y. Supp. 621; *Post Express Printing Co. v. Adams*, 8 N. Y. Supp. 276; *Williams v. Folsom*, 13 N. Y. Supp. 712.

The opinion of the court was delivered by

DUNBAR, J.—This was an action by the appellant Blackburn to obtain a decree that the Black Tail mineral claim, in Stevens county, state of Washington, was located by defendant Welty and plaintiff; that the location thereof,

May, 1898.] Opinion of the Court—DUNBAR, J.

while in Welty's name alone, was in pursuance of an agreement entered into between them, and that under such agreement plaintiff has a half interest in said claim; that the transfer of said mineral claim to the defendant Washington Gold Mining Company, respondent here, was made without consideration and with full notice and knowledge on the part of said defendant of plaintiff's rights therein. Defendants moved to require the plaintiff to state fully and in detail when the trustees and each of them received notice that plaintiff had, or claimed to have, an interest in and to the said Black Tail mineral claim, and state fully and in detail how such notice was given to said trustees and each of them, whether orally or in writing, and, if in writing, to set out a copy of said written notice, and, if orally, to state the contents and substance of said oral notice, and to state fully and in detail what person or persons gave notice to each of said trustees, and the times when and places where each of said trustees were given such notice. Plaintiff's counsel stated to the court at the time of the argument on such motion that he would be unable to comply therewith if it were granted, because the facts were not within the plaintiff's knowledge. The plaintiff also, upon the same day, but after the motion had been granted, filed the following affidavit:

"Alan R. Blackburn, being first duly sworn, upon his oath deposes and says: I am the plaintiff in the above entitled cause; I am unable to state how, where or when the trustees of the Washington Gold Mining Company obtained their knowledge that I own a one-half interest in the Black Tail mining claim, and am therefore unable to comply with the order of the court made herein."

Upon the granting of the motion and the refusal of the plaintiff to furnish the bill of particulars, the cause was dismissed, from which order an appeal was taken to this court.

It is insisted by the appellant that the motion was in effect one to make the complaint definite and certain, and by the respondents that it was one for a bill of particulars. We are inclined to think that the motion was intended to be treated, and should have been, as a bill of particulars. But in either event, we think the court erred in sustaining the motion. The complaint—if it be treated as a motion to make the complaint definite and certain—is already definite and certain as to the averment of knowledge on the part of the trustees; and if it is to be treated as a bill of particulars, which we think it should be, we think it goes beyond any case that has been reported and beyond the intention of the law. The office of a bill of particulars is thus defined on pages 519 and 520 of the third volume of the *Encyclopaedia of Pleading and Practice*:

“A bill of particulars does not set forth the cause of action or the ground of defense; these constitute the function of the original pleading. The chief office of a bill of particulars is to amplify a pleading and more minutely specify the claim or defense set up. Another object of a bill of particulars is to prevent surprise on the trial, by furnishing that information which a reasonable man would require respecting the matters against which he is called upon to defend himself; and by thus limiting the generality of the pleading its effect is to confine the proof to the particulars specified therein. It is well settled, however, that it is not the purpose or office of a bill of particulars to disclose the specific evidence upon which a party relies for recovery.”

In this case, if the demand of the defendants were complied with, the pleadings would in no sense be amplified, nor would the claim or defense set up be any more minutely specified. The defense here is that the trustees of this company had notice. That claim or allegation is about as minutely specified as it could be. Neither would

it prevent surprise on the trial, for the defendants know exactly, under the allegations of this complaint, the question which is in issue. The only office it could have would be to disclose the specific evidence upon which the plaintiff relies for a recovery; and, as we have seen, by the law quoted above and which is well sustained by the authorities, this purpose will not be tolerated.

We think the court erred in granting the motion and the judgment is therefore reversed.

SCOTT, C. J., and GORDON and REAVIS, JJ., concur.

[No. 2923. Decided May 24, 1898.]

LIDGERWOOD PARK WATER WORKS COMPANY, *Appellant*,
v. CITY OF SPOKANE, *Respondent*.

19	365
27	39

ARBITRATION AND AWARD — AGREEMENT FOR — RIGHT OF ACTION FOR
FAILURE — DEMAND NECESSARY.

Where a water works plant in an outlying addition has been transferred to a city in consideration of the city's connecting same with, and maintaining it as a part of, its general system of water works, a provision in the contract that the city shall pay on or before a given date, whatever sum certain named officers as an arbitration board may agree upon as further compensation, makes it incumbent on the seller to demand that the arbitrators proceed to arbitrate before the expiration of that date, in order to give him any right of action against the city by reason of their failure.

An agreement for arbitration is not void by reason of a stipulation that the finding of the arbitrators should be approved by the city council in order to be binding upon the city, since such provision merely constitutes the council a member of the board of arbitrators.

Appeal from Superior Court, Spokane County.—Hon.
LEANDER H. PRATHER, Judge. Affirmed.

Graves, Wolf & Graves, for appellant.

A. G. Avery, for respondent.

The opinion of the court was delivered by

SCOTT, C. J.—In October, 1896, the plaintiff was the owner of a water supply system in an addition to the city of Spokane which was partly without the city limits. The city did not own any water system in that addition and negotiations were had between it and the plaintiff for the transfer of said plant to the city, whereby plaintiff conveyed the same to the city with the exception of the pumping plant. The contract contained the following provisions:

“The party of the second part covenants and agrees to lay immediately; that is to say, within a reasonable time, as soon as the city has money on hand that can be used to pay the freight charges on water pipe, to be placed as follows: A six inch iron water main from Division street, in the city of Spokane, over to and into the reservoir of the party of the first part in Lidgerwood Park, and to maintain the same, and to supply and furnish water hereafter to the residents of Lidgerwood Park, i. e., that portion of Lidgerwood Park included within the city limits; provided, however, that if the city shall furnish water to the people in that portion of Lidgerwood Park not included within the city limits, that the city reserves the right to discontinue the supply of water, without notice, to any and all persons living outside the city limits in said Lidgerwood Park, water to be furnished at the usual rates charged by the said party of the second part for such service, the party of the second part to have all revenues and to operate and conduct said system as a part of its water works system, in the same and no other manner.

The party of the second part further covenants and agrees, on or before the 15th day of September, 1897, to pay to the party of the first part, its successors and assigns, such compensation for the said rights and property, if any,

as may be agreed upon by the arbitration of the mayor, the chairman of the finance committee and the president of the board of public works of the city of Spokane, whose action, when approved by the city council, shall be binding and conclusive upon the parties. It is agreed that, should the said arbitrators determine that the party of the first part shall not be entitled to any further compensation, than the benefits accruing by reason of the party of the second part operating and maintaining said water system and putting in the pipe aforesaid, then the benefits aforesaid shall be deemed the consideration for this contract."

No arbitration having been had and the time having expired, the plaintiff brought this action to recover the sum of \$20,000 as the value of the property transferred. The city answered, setting up the contract. A demurrer by the plaintiff to the answer was overruled and an appeal is taken therefrom, the contention being that, the time for the arbitrators to act having expired, the plaintiff can sue for the value; and the further contention is made that the provision relating to the arbitration is void in consequence of the stipulation that the action of the arbitrators should not be binding unless approved by the city council.

We are of the opinion that the action of the court was right. It is evident that the principal consideration for the sale of the water works was not the provision for possible further recompense, which was practically left to the city itself to allow if it saw fit, but was the acceptance of the plant by the city and the agreement to connect it with the general system which it had in operation, and to maintain it, etc. There was no admission in the contract of any further indebtedness for the plant, and we are of the opinion that it was incumbent upon the plaintiff to have demanded of the arbitrators that they proceed to arbitrate with reference to further compensation, if he de-

sired any, before the time expired, and not having done so, the action cannot be maintained. Nor do we think the provision for the arbitration was void in consequence of the stipulation that the preliminary finding of the officers named, if in favor of the plaintiff, should be approved by the council to be binding on the city. It amounted to an arbitration by said officers named and the council, and we think it was valid.

Affirmed.

DUNBAR and REAVIS, JJ., concur.

GORDON, J., concurs in the result.

[No. 2950. Decided May 24, 1898.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM
KLEIN, *Appellant*.

ASSAULT AND BATTERY—SUFFICIENCY OF INFORMATION—INSTRUCTIONS—REBUTTAL EVIDENCE.

Although an information may charge defendant with the crime of assault with a deadly weapon, which is a statutory offense, the defendant may be convicted, under the information, of the common law offense of assault and battery, when the facts set forth in the pleading are sufficient to describe the latter offense.

No error can be predicated upon the court's refusal to give a requested instruction, when the instruction given by the court covers all the points asked by defendant.

The admission of rebuttal evidence is a matter largely in the discretion of the trial court, and its action in that regard will not be disturbed when it does not appear to be prejudicial to defendant.

Appeal from Superior Court, Spokane County.—Hon. THOMAS H. BRENTS, Judge. Affirmed.

Nuzum & Nuzum, for appellant:

May, 1898.] Opinion of the Court—DUNBAR, J.

Under the information defendant could not be convicted of any other offense than that of simple assault or assault with a deadly weapon. *State v. Marcks*, 58 N. W. 25; *Turner v. Muskegon Circuit Judge*, 50 N. W. 310; *People v. Keefer*, 18 Cal. 638; *Territory v. Dooley*, 1 Pac. 747; *State v. White*, 45 Iowa, 325.

John A. Pierce, Prosecuting Attorney, for The State.

While there may be an assault without a battery, there can be no battery without an assault, and where the necessary facts are alleged in the information to put the defendant on notice that a battery was included, an accompanying and concurrent part of the assault, though all were done with the intent to inflict upon the victim the one or the other specific substantive crime, then in that case the assault and battery is as much a necessary ingredient of the greater crime as is a simple assault. *People v. Congleton*, 44 Cal. 92; *People v. Pape*, 66 Cal. 366; *State v. Elswood*, 15 Wash. 453; *Earl v. People*, 73 Ill. 329; *Beckwith v. People*, 26 Ill. 500; *Prinderville v. People*, 42 Ill. 220; *State v. Ackles*, 8 Wash. 465; *State v. Dolan*, 17 Wash. 499. The name by which the thing charged is called is no essential part of the charge itself. *People v. Cuddihy*, 54 Cal. 53; *People v. Weaver*, 47 Cal. 106; *People v. Tyler*, 35 Cal. 553.

The opinion of the court was delivered by

DUNBAR, J.—The essential part of the indictment upon which the defendants in this case were convicted is as follows:

“That the said defendants John Sigg and W. M. Klein are hereby charged with a public offence, to-wit: the crime of assault with a deadly weapon, committed as follows, to-wit: That on the 31st day of July, A. D. 1897,

and within three years next before the filing of this information at the county of Spokane and state of Washington, the said defendants John Sigg and W. M. Klein, then and there in the said county and state being, then and there unlawfully and feloniously and with an intent to inflict upon the person of John J. Bradfield a bodily injury and with no considerable provocation in and upon the body of said John J. Bradfield did make an assault and with a certain deadly weapon, to-wit: a lathing hatchet, which they, the said John Sigg and W. M. Klein then and there in their hand had and held, did strike, cut and wound the body of him, the said John J. Bradfield, contrary to the statute," etc.

A plea of not guilty was entered by both of the defendants and after trial and submission to the jury, a verdict was returned against the defendants for assault and battery. Judgment was pronounced and the defendant Klein appeals.

The first error alleged is the overruling of defendant Klein's motion to be discharged upon the verdict rendered in the above cause, for the reason that under the information he could not be convicted of any other offense than that of simple assault or assault with a deadly weapon, it being contended that an assault with a deadly weapon is purely a statutory crime and that the offense of assault and battery is a separate and distinct offense, and that the rule that the defendant may be found guilty of a lesser degree of the same crime does not apply in this case. Whatever may be said of this contention as a general proposition, it does not apply in this particular case, for while it is stated in the information that the defendants were charged with the crime of assault with a deadly weapon, the facts set forth in the information certainly charge the crime of assault and battery, and it is the facts, and not the name, which the pleader saw fit to give the crime, that put the defendants upon notice. In fact, it

May, 1898.] Opinion of the Court—DUNBAR, J.

is stated by the appellant in his brief, on page 9, that the information charged the offense of assault and battery, but as no motion was made against it no error is predicated upon that fact; and if it be true that no error is predicated upon the fact that two crimes were charged in the indictment, the motion cannot be raised here now, for the record discloses the fact that the question of assault and battery was tried.

The second allegation is that the court erred in refusing the request of the defendant to instruct the jury as follows:

“I instruct you as a matter of law that before you can convict a defendant as aiding and abetting a co-defendant, a common purpose must be proven to your satisfaction and beyond a reasonable doubt, or that there was a previous understanding or that the co-defendant, aiding and abetting, if you find he was aiding and abetting, had knowledge of the design or the intent of his co-defendant to commit an offense. In other words, a common purpose must be proven in order to justify a conviction for aiding and abetting.”

The contention of the appellant is that he did not in any way participate in the affair and that, therefore, he could not have been convicted upon proof of a common purpose. It seems to us that the court, in the instruction which it did give, covered all grounds asked by this instruction and even went further in the interests of appellant than was asked by the instruction. The court instructed the jury as follows on this proposition:

“If you find that an assault was committed, or an assault and battery, or an assault with a deadly weapon, with intent to inflict upon Bradfield bodily injury, without considerable provocation, and that such assault was committed by one of the defendants and that the other of the defendants was present aiding, abetting and assisting him, then both of the defendants would be equally guilty and you may convict them both.”

The court did not stop here, leaving the reverse of the proposition to be accepted by the jury, but gave the further instruction:

“But if the evidence shows that the assault was made by one of them alone, and that the other was not present or not aiding, abetting, encouraging or assisting him, then you could only convict the one who committed the assault and should not convict the other.”

This goes beyond the question of a common purpose and informs the jury that, before the defendant who was not actively engaged in the assault can be convicted, it must be found that he was actively aiding, abetting, encouraging or assisting the defendant who did commit the assault. We think no error was committed by the court in refusing the instruction asked for. So far as the testimony is concerned in relation to the participation in this affray by the appellant, it is conflicting and the jury was the judge of the credibility of the witnesses.

The third alleged error is substantially covered by what we have said in regard to the first. It is also alleged that the court erred in permitting the state to call the witness Kendall in rebuttal and permitting him to testify with regard to a conversation he heard between Bradfield and Klein. This was a matter which was largely discretionary with the lower court, and we think the defendants were in no wise prejudiced by the admission of this testimony.

The fifth allegation, that the court erred in overruling a motion for a new trial as to Klein, for the reason that the verdict is not sustained by the evidence, falls within the scope of what is said concerning the second assignment of error.

The judgment is affirmed.

SCOTT, C. J., and GORDON and REAVIS, JJ., concur.

May, 1898.] Opinion of the Court—REAVIS, J.

[No. 2854. Decided May 25, 1898.]

A. J. KROENERT *et al.*, *Appellants*, v. SOPHIA GUSTASON, *as Guardian, Respondent*.

APPEAL—SETTLEMENT OF STATEMENT OF FACTS—NOTICE.

Where a notice to respondent that appellant will apply to the judge to settle and certify a statement of facts fails to designate the place where the settlement and certification are to be had, the notice is insufficient, under Laws 1893, p. 114, § 9 (Bal. Code, § 5058), which requires the time and place to be specified in such notices.

Appeal from Superior Court, Chehalis County.—Hon. CHARLES W. HODGDON, Judge. Appeal dismissed.

J. C. Cross, for appellants.

W. H. Abel, for respondent.

The opinion of the court was delivered by

REAVIS, J.—Plaintiffs, Kroenert Brothers, commenced a suit to foreclose a mortgage against Gustason and wife and others. Judgment of foreclosure was rendered and a sale of the mortgaged premises decreed. Thereafter sale was made and one Elston was the purchaser and received the sheriff's certificate of sale, and he thereafter paid the taxes due on the premises so purchased. Afterwards Kroenert Brothers gave notice of their intention to apply to the sheriff to redeem from the sale to Elston and did so redeem. After confirmation of the sale under foreclosure, Sophia Gustason, as guardian for the Johnson minors, applied to the sheriff to redeem from Kroenert Brothers, first mortgagors. The sheriff refused to execute a redemption certificate to Mrs. Gustason as such guardian. Whereupon Mrs. Gustason, as guardian afore-

said, filed her bill in the superior court to redeem the premises. Issues were made up and a trial had, and judgment of the court decreeing the redemption rendered. From this judgment Kroenert Brothers have appealed.

The only errors urged by appellants arise upon the testimony heard in the superior court and exceptions taken to the findings of fact. Respondent has moved to strike from the record here the purported statement of facts in the cause, on the ground that no notice of the certification of the statement was given as required by law. It appears that a proposed statement of facts was filed in the superior court by appellants and notice of the filing thereof given to respondent, and included in the notice respondent was further notified that appellants would, at the expiration of ten days from the date of notice, at the hour of two o'clock in the afternoon of that day, ask the court and the judge thereof to settle and certify the statement of facts. Within the ten days after the filing of the statement, respondent moved to strike certain portions of the proposed statement and also proposed certain amendments thereto. No other or further notice of the settlement of the statement before the superior judge was given, and respondent did not appear before the judge at the time of the purported settlement and certification of the statement brought here. But it appears from the certificate of the superior judge that, after several postponements of the time of the settlement upon the motion of appellants, the judge refused to strike any of the matters contained in the proposed statement as requested by respondent, but granted the amendments to the statement proposed by respondent. The settlement of the statement as mentioned was *ex parte*.

Without considering whether the notice of filing the statement could also contain a notice of the time and place

May, 1898.] Opinion of the Court—REAVIS, J.

of the settlement of the same, it will be observed that the notice given did not specify the place of settlement and certification. In determining the effect of such omission of place in the notice to settle a statement of facts, this court said, in *American Asphalt Co. v. Gribble*, 8 Wash. 255 (35 Pac. 1098):

“The notice of filing the statement of facts herein, which was served on the respondent, failed to designate a place at which the appellant would apply to the court or judge who tried the cause or rendered the judgment complained of, to settle and certify said statement of facts. The notice, therefore, omitted one of the positive requirements of the statute then in force (Code Proc. § 1422), and consequently was wholly ineffectual for the purpose intended;”

and it was ruled that such statement of facts could not be considered by the court, and a motion to strike the statement from the record was granted. Section 9 of the appeal act, Laws 1893, p. 114 (Bal. Code, § 5058) under which this appeal is taken, prescribes that, “Either party may then serve upon the other a written notice that he will apply to the judge of the court before whom the cause is pending or was tried, at a time and *place* specified,” etc., to settle and certify the statement. It will thus be seen that the effect of such omission to specify the place in the notice to settle and certify a statement of facts or bill of exceptions has been determined in the case above cited.

The motion to strike the statement of facts is therefore granted and, there being nothing further to be considered in the cause, the appeal is dismissed.

SCOTT, C., J., and GORDON and DUNBAR, JJ., concur.

[No. 2948. Decided May 26, 1898.]

THE STATE OF WASHINGTON, *Respondent*, v. AUGUST SMITH, *Appellant*.

INTENT TO RAPE—SUFFICIENCY OF INFORMATION.

An information charging defendant with an assault with intent to commit rape, made "on the 20th day of October, 1897, and within three years next before the filing of this information," by feloniously attempting to carnally know and abuse a female child under the age of eighteen years (the age of consent), is sufficient in its charges as to time and nature of the offense. (GORDON, J., dissents).

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Fenton & O'Brien, for appellant.

John A. Pierce, Prosecuting Attorney, for the State.

The opinion of the court was delivered by

REAVIS, J.—Appellant was charged with a public offense in the following terms:

"The crime of assault with intent to commit rape, committed as follows, to-wit: That on the 20th day of October, 1897, and within three years next before the filing of this information, at the county of Spokane and state of Washington, the said defendant, August Smith, then and there in the said county and state being, then and there unlawfully and feloniously did then and there in and upon one Millie Rux, a female child under the age of eighteen years, feloniously attempt to carnally know and abuse," etc.

A motion to quash and a demurrer to the information were filed and overruled before trial. The demurrer sets up that the information does not substantially conform to the requirements of the criminal code; that the facts

May, 1898.] Opinion of the Court—REAVIS, J.

stated in the information do not constitute a crime; that the information does not inform the defendant of the nature and cause of the charge against him; that the information is not direct and certain; that the allegation of time is indefinite and uncertain; that the act or omission charged as the crime is not stated with such degree of certainty as to enable the court to pronounce judgment; and that the statutes under which the information was filed are unconstitutional. It will not be necessary specifically to notice each ground of the demurrer. The jury returned a verdict of "guilty as charged in the information," and the judgment of the court entered thereon adjudged the defendant guilty of the crime of assault with intent to commit rape as charged in the information. It is maintained by counsel for appellant that it is uncertain what offense is charged in the information; whether the defendant is charged under the statute prescribing the punishment for assault with intent to commit rape (§ 22, Penal Code; Bal. Code, § 7057) or charged with an attempt to commit rape under ch. 14, 2 Hill's Penal Code (Bal. Code, § 7436), "on attempts to commit crimes." The information specifically charges appellant with assault with intent to commit rape, and then states the fact constituting the crime, that is, "unlawfully and feloniously attempting to carnally know and abuse," etc., in the language of the statute of 1897, Laws 1897, p. 19. It has been ruled here that it is not necessary to charge or allege force in assault with intent to commit rape where the fact is alleged that the female is under the age of consent. See *State v. Hunter*, 18 Wash. 670 (52 Pac. 247). The fact that the word "attempt" is used in stating the facts which constitute the crime cannot be misleading. It does not purport to be technically used to define the crime of attempt to commit rape, for an assault with an intent to

commit the substantive crime involves necessarily an attempt. See *State v. Elswood*, 15 Wash. 453 (46 Pac. 727). The time is specifically charged in the information. The offense is specifically charged. The objections to the information were, therefore, properly overruled and the judgment of the superior court is affirmed.

SCOTT, C. J., and DUNBAR, J., concur.

GORDON, J., dissents.

[No. 2941. Decided May 27, 1898.]

THE STATE OF WASHINGTON, *on the Relation of C. P. Twiss et ux., Respondents*, v. E. F. CARPENTER, as Sheriff of Lewis County, Washington, AND JOHN MILES, *Appellants*.

FORECLOSURE—SALE BY PARCELS—REDEMPTION.

Where mortgaged premises have been sold by the sheriff, on foreclosure in parcels, and the sale has been confirmed by the court, the mortgagee is entitled to redeem any parcel so sold separately by tendering the amount for which it was sold, together with interest on same and taxes and costs chargeable against said tract, under the provisions of Code Proc., § 504 (Bal. Code, § 5288), authorizing the sheriff to sell lots and parcels separately or together, as he shall deem most advantageous, and of § 512, allowing redemption of property sold subject to redemption, "or any part thereof separately sold."

Appeal from Superior Court, Lewis County.—Hon. H. S. ELLIOTT, Judge. Affirmed.

Reynolds & Stewart, for appellants.

Charles P. Twiss, for respondents.

May, 1898.] Opinion of the Court—GORDON, J.

The opinion of the court was delivered by

GORDON, J.—On June 2, 1897, the superior court of Lewis county entered a decree foreclosing a mortgage executed by the respondents to the appellant Miles upon the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of sec. 26, and the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of sec. 25, Tp. 13 N., of R. 1 W., in Lewis county. On July 10, 1897, the mortgaged premises were sold to satisfy the mortgage debt, which then amounted to \$1,210.75 and costs. The decree contained no specific direction as to the manner in which the premises should be sold, and they were sold in four separate parcels. Two of the tracts so sold, to-wit: the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of sec. 26 and the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of sec. 26, were sold at \$10.60 per acre. The two remaining tracts were sold at \$6.61 per acre, the entire premises bringing \$1,376.80, and the appellant Miles (who was the mortgagee) became the purchaser at the sale. Thereafter and within the time permitted by law in which to redeem from the sale, the respondents gave notice of their intention to redeem one of the tracts so sold, viz., the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of sec. 26, and pursuant to said notice offered to pay the appellants the amount for which said tract was sold, together with interest, taxes and costs chargeable against said tract, and demanded a certificate of redemption, which was declined by appellants for the alleged reason that respondents were not entitled to redeem without paying the entire purchase price bid by Miles for the entire mortgaged premises. Thereupon respondents instituted this proceeding in the superior court to compel the execution of a redemption certificate for the tract of land so sold. Appellants' demurrer to the petition having been overruled, an answer was interposed which, in addition to what has already been stated, set forth that the property mortgaged comprised one farm that had always

been used and operated as such; that at the foreclosure sale appellant Miles purchased the whole of said lands at the prices heretofore stated in order to protect and secure himself; that the tract of land which respondents are seeking to redeem has more improvements and buildings upon it than any of the other tracts and, if separated from the remainder, would destroy the value of the remaining parts and make them worthless and unsalable for any price sufficient to pay the balance due. The court sustained respondents' demurrer to the answer, and, they having elected to stand upon it and declining to plead further, judgment was rendered awarding a peremptory writ and for costs, and the case is here on appeal therefrom.

It will be seen that the case presents a single question for decision, viz., are the respondents entitled to redeem one of the forty acre tracts at the price paid therefor at the mortgage sale, with interest, taxes and costs added, without paying the amount which was realized from the sale of the entire mortgaged premises? We think the statute in effect at the time of the judgment and sale requires the question to be answered in the affirmative. Section 504, 2 Hill's Code (Bal. Code, § 5288), authorizes the sheriff to sell "the lots and parcels separately or together, as he shall deem most advantageous," and requires that all land except town lots shall be sold by the acre. We agree with respondents that the sheriff must be presumed to have acted in good faith and that the mortgaged premises in this case were sold in parcels because it was considered most advantageous to do so. If, as alleged in appellant's answer and return, the different legal subdivisions comprising the mortgaged premises are so connected as to have made it desirable that they should be sold together, the showing could have been made to the court and the decree entered accordingly. But, as already

May, 1898.] Opinion of the Court — GORDON, J.

stated, the decree contained no specific directions as to the method of sale. Not only that, but the sale as made was confirmed by the court upon plaintiff's own motion, and this is conclusive, we think, as to the propriety of the action of the sheriff in selling the land by parcels. The statute gave to the respondents a year from the date of sale in which to redeem, and § 512, 2 Hill's Code, provides that property sold subject to redemption, "*or any part thereof separately sold*, may be redeemed," etc. This statute does not limit the right of redemption to the entire premises sold but extends it to each tract separately sold, where the sale has been by parcels, otherwise what could be the meaning of the words, "*or any part thereof separately sold*?" Let us suppose that at the sale the separate parcels were purchased by different bidders. Could it be successfully contended that the purchaser of one of the tracts would have the right to defeat redemption as to that tract unless, in addition to the amount which he paid therefor, the amounts paid by the purchasers of the other tracts were also tendered? What possible interest could he have in the other tracts or in the money paid for their purchase? And what difference can there be under the law between a case where one party purchases several parcels and one where the separate parcels are sold to different purchasers? We think there is no difference and that the right to redeem and the terms upon which the right may be exercised are the same in either case. Appellants' counsel have cited numerous authorities in support of the general proposition that "a mortgage is an entire thing and must be redeemed entire and that the mortgagee cannot be compelled to divide his debt and security." But we think counsel fail to observe the distinction between redemption from a mortgage and redemption from a foreclosure sale. There is, however, a

well recognized distinction. In *Jones on Mortgages*, § 1070, it is said:

“Redemption from a foreclosure sale within the time allowed by statute in several states may be made by paying the purchaser the amount of his bid with interest. . . . *Such a redemption is not a redemption from the mortgage, but a redemption from the sale, and is a statutory right.*”

See, also, *Tuttle v. Dewey*, 44 Iowa, 306.

Without attempting to analyze the decisions cited by appellants' counsel, we deem it sufficient to say that all or nearly all of them are cases where the redemption attempted was from the mortgage—as distinguished from the foreclosure sale—or where redemption was attempted by a part owner of mortgaged premises for a sum less than the full amount of the mortgage. With these authorities we do not disagree. They are not applicable to the present case. But aside from any question as to what the law may be elsewhere, the rule in this state is settled by the plain terms of the statute, which has given the mortgagor an absolute right to redeem any parcel of land from a foreclosure sale by repaying the amount bid for such property at such sale, together with interest, costs and taxes. We can see no injustice in permitting it to be done. It is calculated to insure a fair price being obtained at the sale. It enables rival bidders to deal upon terms of equality. The appellant obtains the remaining tracts at the prices which he bid therefor. It can no more be said that he paid too much for them than that he paid too little for the one redeemed. Presumably he purchased the separate parcels with full knowledge as to their relation to each other and the relative value of each, and he must abide the consequences of his voluntary act.

The judgment of the superior court is affirmed.

DUNBAR and REAVIS, JJ., concur.

May, 1898.] Opinion of the Court—DUNBAR, J.

[No. 2898. Decided May 31, 1898.]

THE STATE OF WASHINGTON *on the Relation of J. W. Witherop, Respondent, v. JOHN F. BROWN et al., Appellants.*

19	383
29	12

19	383
32	812

MANDAMUS — PARTIES — DEMAND — ASSESSMENTS AGAINST IRRIGATION DISTRICTS.

Where it is made the duty of the county commissioners to make an assessment to pay the interest upon the bonds of an irrigation district, upon the failure of the district directors to make provision therefor, mandamus will lie to compel the county commissioners to levy such assessment, if the right to relief is clear, and in such an action the irrigation district is not a necessary party, when the legality of the bonds has already been determined in another action to which it was a party.

Demand upon the officers of an irrigation district to make an assessment to pay interest on bonds is unnecessary, when by unreasonable delay they have lost the power to make the levy and the duty has devolved upon the county commissioners.

Appeal from Superior Court, Kittitas County.—Hon. JOHN B. DAVIDSON, Judge. Affirmed.

Kirk Whited, Edward Pruyn, and H. J. Snively, for appellants.

Graves & Englehart, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—Mandamus proceedings were commenced against the board of county commissioners of Kittitas county, Washington, to compel the levy of a tax by said commissioners to pay the interest upon certain alleged bonds of the middle Kittitas irrigation district, the same being a district alleged to have been organized under the act of the legislature of the state of Washington entitled “An Act providing for the organization and government of irrigating districts and the sale of bonds arising there-

from, and declaring an emergency," approved March 20, 1890 (Gen. Stat. §§ 1784-1861). The complaint alleged the authorization and issuance of the bonds of the district, that the plaintiff was the purchaser, owner and holder of certain bonds issued under such authorization, that the interest on said bonds had not been paid when due, and asked that the commissioners be compelled to levy an assessment sufficient to pay said interest. The answer denied the material allegations of the complaint and set up three affirmative defenses. A demurrer was interposed to the affirmative defenses and was sustained as to the first and second. We think the demurrer was properly sustained and should have been sustained as to the third affirmative defense, for the third affirmative defense is not a defense under the statute, but, if it amounts to anything, is an argument on the propositions involved in the case. No appeal, however, was taken by the respondent from the refusal of the court to sustain the demurrer to the third affirmative defense. There is no question but that the allegations of the complaint were proven. No proper exceptions to the findings of fact appear in the record, and, if such exceptions had been taken, an examination of the record in detail convinces us that the findings were sustained by the testimony, so that, if there are any questions in this case for this court to determine, they are purely questions of law, and the first is, was there a defect of parties defendant in this proceeding by reason of the middle Kittitas irrigation district not being made a party defendant? It was strenuously insisted by the counsel for the appellant in his oral argument that the property of the district could not be taken in an action where the district was not a party, and the case of *Cassatt v. Board of County Com'rs*, 39 Kan. 505 (18 Pac. 517) was cited as a case directly in point sustaining that proposition. But

May, 1898.] Opinion of the Court—DUNBAR, J.

an examination of that case convinces us that it has no application whatever to the case at bar. There it was decided that a peremptory writ of mandamus would not be issued against a board of county commissioners to compel it to levy taxes upon the taxable property situated within a school district to pay interest on the bonds of the school district, unless the right was clear and the school district had an opportunity to be heard. Without pursuing that decision further, it does appear in this case that the right is clear and that the irrigation district had had an opportunity to be heard on the proposition of the legality of these bonds, for finding No. 4 of the court, following the findings which show that the board of directors of this district for the purpose of constructing necessary irrigation canals had submitted the question of raising \$200,000 to the electors of the district and that said election was regularly and duly held in pursuance of said call and notice of election and that the majority of the votes cast at said election were in favor of said bonds, was as follows:

“That thereafter and prior to the sale and delivery of said bonds as hereinafter found, the board of directors of said irrigation district commenced a proceeding in the superior court of Kittitas County, state of Washington, praying that the proceedings for the organization of said district and all proceedings and elections providing for and authorizing the issue and sale of the bonds aforesaid might be examined, approved and confirmed by said court; and such proceedings were thereafter had in said cause that on the — day of October, 1897, the superior court of said Kittitas County, entered an order and judgment in all matters and things approving and confirming the legality and validity of said bonds, and each and all of the proceedings for the issuance of said bonds from and including the petition for the organization of the district down, and to the order for the sale of said bonds, which said judgment now stands and has not been in any manner reversed.”

So that it will be seen that in that action, to which the district was a party, all questions relating to the rightful issue of these bonds were determined in favor of the validity of the bonds, and the assertion is scarcely needed that the district is bound by this judgment and that it could not, if it had been made a party to this action, have raised any of the questions determined by said judgment.

High on Extraordinary Legal Remedies (2d ed.), § 440, lays down the rule as follows:

“As regards the joinder of parties respondent in writs of mandamus, the first general principle to be observed is, that the writ should run to the person or body whose duty it is to perform the act required. It will not, therefore, lie to one person to command another to do the required act. Nor is it the practice to make any other persons parties respondent than the officer whose conduct is complained of.”

The same rule is announced on page 219 of 14 Am. & Eng. Enc. Law, and the cases cited fully sustain the announcement. In this case, under the statute of 1890 it was the duty of the county commissioners, the directors of the district not having acted in accordance with the law, to make this assessment. It being their duty to perform this act, the writ of mandamus was the proper remedy to compel them to do so. In addition to the general propositions of law as sustained by the authorities, our code specially authorizes this procedure in a case of this kind. Section 5755, Bal. Code (Laws 1895, p. 117, § 16) provides that a writ of mandamus may be issued by any court, except a justice's or a police court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station. As we have seen, it was the duty of the county commissioners, upon the omission of the directors of the irrigation company, to make the assessment.

May, 1898.] Opinion of the Court—DUNBAR, J.

It is also contended that no demand was made for this assessment. It was specially found by the court and was proved in the testimony that a demand was made upon the commissioners. We think under the law and the facts in this case that no demand was necessary so far as the directors were concerned. The authorities are somewhat at variance on the question of the necessity of a previous demand, but the great weight of authority seems to be that which recognizes the distinction between duties of a public nature and duties of a merely private nature affecting only the rights of individuals; and that, where the person aggrieved claims the immediate and personal benefit of the act, a demand is evidently necessary as a condition precedent to relief, but that, where the duty is strictly of a public nature and there is no one specially empowered to demand its performance, there is no necessity for a literal demand and refusal, and that in such case the law itself stands in lieu of the demand and the neglect to perform the duty in lieu of the refusal. *High, Extraordinary Legal Remedies*, § 13; 89 Am. Dec. 731, note. In this case the demand would have been futile and unnecessary upon the officers of the irrigating district because under the terms of the law they had become powerless to make the assessment, and the duty had devolved upon the county commissioners. In addition to this, an unreasonable delay in the performance of the duty by a public officer is held equivalent to a refusal, and sufficient to justify granting relief. 2 *Dillon, Municipal Corporations* (4th ed.) § 866.

We see nothing to convince us that the law in this case is unconstitutional and have not been able to find any errors that were committed by the trial court. The judgment will therefore be affirmed.

SCOTT, C. J., and REAVIS, GORDON and ANDERS, JJ.,
concur.

19 388
28 579

[No. 2905. Decided May 31, 1898.]

CHARLES L. LEWIS *et al.*, *Appellants*, v. GEORGE
McDOUGALL, *Defendant*, N. VOORHEIS, *Respondent*.

APPEAL—ASSIGNMENT OF ERRORS—BRIEFS.

When findings of fact questioned by appellant are not printed in his brief, the sufficiency of the findings with reference to the testimony will not be considered by the court.

Appeal from Superior Court, Chehalis County.—Hon.
CHARLES W. HODGDON, Judge. Affirmed.

N. W. Bush, for appellants.

W. H. Abel, for respondent.

PER CURIAM.—This was an action in equity involving the foreclosure of a chattel mortgage and liens for material and labor. The questions raised on the appeal relate to the rulings of the court as to certain matters offered in evidence and also as to some of the findings made. None of the findings of fact questioned were printed in the appellants' brief and the respondent heretofore moved to dismiss the appeal for that reason. This motion was denied on the ground that it was then claimed that the judgment was not supported by the findings. No reason was shown for the failure to print the findings and no application was made for leave to do so, and in accordance with the well-settled practice errors in the admission and rejection of evidence could not be considered without an exception to the findings thereon, nor could the sufficiency of the findings with reference to the testimony be questioned, without printing the findings in the brief under the rule. An examination of the record shows that the decree rendered was amply supported by the facts found, and it is affirmed.

[No. 2926. Decided May 31, 1898.]

SEATTLE TRUST COMPANY, *Respondent*, v. ALBERT S.
KERRY *et ux.*, *Appellants*.

FORECLOSURE OF MORTGAGE—SERIES OF NOTES—STATING CAUSE OF
ACTION—REJECTION OF EVIDENCE—HARMLESS ERROR.

In an action to foreclose a mortgage securing a series of notes it is not necessary to state a separate cause for each note, but they may all be properly set forth as one cause of action.

Alleged error in the court's refusing to admit evidence as to an extension of time of payment granted by an agent was harmless, when there was no showing that the agent was authorized to bind his principal in that particular.

Appeal from Superior Court, King County.—Hon.
WM. HICKMAN MOORE, Judge. Affirmed.

Allen & Allen, for appellants.

Strudwick & Peters, for respondent.

The opinion of the court was delivered by

SCOTT, C. J.—Appellants Kerry were owners of certain real estate in the city of Seattle, and they executed two mortgages thereon to the plaintiff, a corporation, the first one to secure the sum of \$2,100, and the second one to secure forty-five promissory notes, each for the sum of \$40, with interest. Thereafter Kerry and wife sold the real estate, the grantee assuming the payment of the mortgages. This action was brought to foreclose the subsequent mortgage, and to recover for certain insurance premiums and interest upon the prior mortgage which the plaintiff had assigned with a guaranty of payment and claimed to have made said payments thereafter. A personal judgment was asked against the appellants Kerry and also against the grantee. The grantee defaulted but Kerry and

wife appeared and resisted the suit, and have appealed from a judgment against them.

They move to strike the complaint because several causes of action were improperly united therein and not separately stated, as required by law. There is no substantial merit in this contention, at least as the case now stands. The mortgage given to secure the series of notes was properly set forth as one cause of action, and it was not necessary to state a separate cause for each of said notes; and the further claim for insurance arising from both mortgages and the claim to recover for the interest paid upon the prior mortgage were separately pleaded.

Two defenses were set up by the appellants. One was an agreement entered into between the plaintiff and the appellants at the time they sold the real estate, whereby it was claimed the plaintiff agreed to accept the grantee as its debtor and to release the appellants from all liability. The second one was that, in the event the first should not be established, the fact that the grantee agreed to pay the mortgage debts, which was known to the plaintiff, in law constituted the appellants sureties merely for the payment of said debts, and that they were released from liability in consequence of the plaintiff having thereafter granted an extension of time to their grantee.

A number of errors have been alleged with reference to the exclusion of certain testimony which the appellants sought to draw out on cross-examination of some of plaintiff's witnesses. It is unnecessary to set these matters forth in detail. The record shows that some of the evidence sought to be so introduced was obtained at a later stage of the trial and the rest of it was either immaterial or improper cross-examination, and there was no harmful error. An examination of the proof convinces us that we would not be warranted in setting aside the finding of the lower

May, 1898.] Opinion of the Court—Scott, C. J.

court that there was no agreement to release the appellants, nor in contravening the failure to find that there was an extension of time to their grantee whereby they were released.

The other errors alleged are with reference to the refusal of the court to permit certain evidence bearing upon the question of the extension of time. We also regard these as immaterial, for, if it were conceded that there was an agreement upon the part of the agent who purported to act for the plaintiff to accept the appellants' grantee and release the appellants, and thereafter to extend the time to its grantee, we are yet of the opinion that judgment was properly rendered against the appellants for the reason that it did not appear that either of the agreements was made with an agent who was authorized to bind the plaintiff in the particulars mentioned. An agent might have power to collect claims due a corporation and look after certain matters of business, even in a general way, and still not have the greater power to release obligations due the principal, and there was nothing to show that any such power existed in this instance.

The real contention in this appeal is over the facts found by the court, to which the appellants excepted, but an examination of the evidence satisfies us that they were well sustained, and the decree is affirmed.

REAVIS, GORDON and DUNBAR, JJ., concur.

ANDERS, J., not sitting.

[No. 2953. Decided May 31, 1898.]

L. S. ROBERTS, *Appellant*, v. WASHINGTON WATER
POWER COMPANY *et al.*, *Respondents*.

CORPORATIONS—CONTRACT FOR BOND—AUTHORITY OF OFFICERS—
APPEAL—OBJECTIONS NOT RAISED BELOW.

In an action on a bond to recover liquidated damages, an answer denying the execution of the bond, and also admitting its execution as a bond fixing a penalty instead of liquidated damages, cannot be attacked on appeal, when no objection has been raised on that ground in the lower court.

An order of the board of directors of a corporation authorizing its president and secretary to sign its name as surety upon a bond for a given sum, would raise the presumption that the authority given was merely to execute a bond providing for a penalty instead of one providing for liquidated damages.

Appeal from Superior Court, Spokane County.—Hon.
A. L. MILLER, Judge. Affirmed.

W. J. Thayer, for appellant.

Thomas C. Griffiths, and Dudley & Dudley, for respondents.

The opinion of the court was delivered by

SCOTT, C. J.—This was an action on a bond to recover \$25,000 as liquidated damages for a failure to build a street railway. Burns was made a defendant because he refused to be a plaintiff; the other two defendants were sued as signers of the bond. The case was tried without a jury, and at the conclusion of the plaintiff's testimony a judgment of nonsuit was rendered from which this appeal is taken. The plaintiff was the assignee of the obligees in the bond, who at the time of its execution owned a controlling interest in the Ross Park street railway company, which company owned and operated a line of electric street

19	392
24	392
24	396

May, 1898.] Opinion of the Court—Scott, C. J.

railway in the city of Spokane. The defendant, Washington Water Power Company, was engaged in the street railway, electric lighting and milling business in said city through the agency of several subordinate corporations, one of which was the Spokane Street Railway Company which was engaged in operating electric street railways, and another the Edison Electric Illuminating Company, engaged in the electric lighting business. The Washington Water Power Company had power under its articles to acquire stock in other corporations, etc., and owned a controlling interest in the stock of the two companies named. The business of the three corporations was transacted in one office, and the defendant Norman was the general manager of each, the two subordinate corporations being in charge of committees appointed by the board of trustees of the Washington Water Power Company. Said last named company, desiring to obtain a controlling interest in the Ross Park road and to operate it in connection with its other corporate business, entered into negotiations with certain of the stockholders for the purchase of their shares of stock, the negotiations being carried on by Norman in his own name, but as agent for the Washington Water Power Company. A controlling number of shares in the Ross Park road were transferred to the Washington Water Power Company, in consideration whereof said last named company was to operate the Ross Park road and pay certain of its debts; to build an extension to Minnehaha Park in three months, and another extension to the southeast addition to Ross Park within one year, if demanded, and if not so demanded, within two years in any event; also to furnish certain annual passes, and to give a thirty thousand dollar bond. These terms were embodied in a preliminary or memorandum agreement, February 3, 1892. This agreement was signed by Norman and the

various persons who were to transfer to the Washington Water Power Company the controlling number of shares of stock in the Ross Park road.

The action was brought upon the bond to recover damages for the failure to complete the extension to the southeast addition to Ross Park. The answer denied the execution of the bond set forth in the complaint, on the grounds that it was beyond the power of the corporation to make and also that its execution had never been authorized by its trustees and that Norman had no authority to execute it. It was further set up as an affirmative defense that the bond was given to secure the performance of the written contract aforesaid, the provision in the contract relating to the bond being as follows:

“That said party of the first part will give to said parties of the second part a good and sufficient bond in the sum of \$30,000 with the Washington Water Power Company as a surety thereon.”

And some further defenses were pleaded. The bond as given was for the sum of \$30,000, and one clause inserted among the conditions provided for the payment of \$25,000 as liquidated damages, in the event that the extension to the southeast addition to Ross Park should not be built as provided. The trial court held that the clause in the contract aforesaid, which provided for a \$30,000 bond, did not authorize a bond with a condition for payment as liquidated damages, and that Norman had no power to bind the Washington Water Power Company for the payment of a fixed sum as damages. The minutes of the corporation from which the authority to execute the bond is claimed are as follows:

“Spokane, Wash., Feb. 3, 1892.

A special meeting of the directors of the Washington Water Power Company was held this day at the office of the company, at 9:30 a. m., there being present C. R.

May, 1898.] Opinion of the Court—Scott, C. J.

Burns in the chair, H. Brook, F. E. Goodall, H. Bolster, J. D. Sherwood and W. S. Norman. The subject matter of the purchase of the Ross Park Street Railway Company was the special order of business. The manager reported that he had concluded negotiations for the acquirement of 70 per cent. interest in the Ross Park Street Railway Company, representing \$53,200 worth of stock, our company to assume its share of the gross indebtedness of the Ross Park Street Railway Company, amounting to \$60,000. On motion of J. D. Sherwood, seconded by H. Brook, W. S. Norman was authorized to make the purchase of the stock, and hold the same in his name until such time as some other disposition might be made of the same, he to endorse the stock, and leave the same with the proper officers of the company.

On motion of H. Bolster, seconded by H. Brook, the following resolution was adopted:

Resolved: That the president and secretary of the Washington Water Power Company be, and are hereby authorized to sign in the name of this company, as surety, to a certain bond, in the sum of \$30,000, executed by W. S. Norman, in favor E. J. Webster, trustee, dated February.

Carried. Meeting then adjourned.

W. S. Norman, Secretary."

There are but two points which it is necessary to consider in the disposition of the appeal. One is a contention by the appellant that the answer admitted the execution of the bond sued on. This is based upon the claim that the defenses pleaded were inconsistent in denying the execution of the bond and then in effect admitting its execution for another purpose than the one alleged as a breach. It does not appear that this matter was called to the attention of the lower court in any way. It is not necessary to set forth the answer in detail, for, if it were conceded that it was inconsistent in the particulars mentioned, we do not think the contention of the appellant should be sustained at this time, for it is plainly apparent from the answer that

it was the intention of the pleader to question the validity of the bond with reference to the provision for liquidated damages and to deny any authority of the agent aforesaid to bind the corporation thereby. Not having attacked the answer in the lower court, we do not think the appellant should be entitled to claim that the execution of the bond was admitted when the intention to deny its execution or validity as aforesaid is evident. There should be no uncertainty about an admission to bind a party in this way.

We are also of the opinion that no authority was shown in the minutes for the execution of the bond in question. Under such authority the presumption would be that the \$30,000 was intended as a penalty merely, and the authority to execute a bond providing for liquidated damages should have been clearly shown to render it valid. We think the judgment of the lower court was right, and it is affirmed.

REAVIS, ANDERS, GORDON and DUNBAR, JJ., concur.

[No. 2961. Decided May 31, 1898.]

GILBERT F. BOGUE, *Appellant*, v. CITY OF SEATTLE
AND WILL H. PARRY, *as City Comptroller, Respondents*.

CONSTITUTIONAL LAW—SUBJECT AND TITLE OF STATUTE—POWER TO
ABOLISH OFFICE.

An act which repeals an act authorizing municipal courts, but makes provision for their continuance until a certain date, is not objectionable as embracing more than one subject, since the subject of the act is the abolishment of the office with a designation of the time when the act shall become effective; and the title, which declares that it is an act repealing the act establishing municipal courts and abolishing the courts and offices thereby created, is broad enough to cover the subject matter.

May, 1898.]

Opinion Per Curiam.

An act shortening a term of office, or abolishing an office, which had been created by the legislature, is not a violation of the constitutional provision that "the salary of any county, city, town or municipal officer shall not be increased or diminished after his election or during his term of office; nor shall the terms of any such officer be extended beyond the period for which he is elected or appointed."

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

Ballinger, Ronald & Battle, for appellant.

W. E. Humphrey, and *Edward Von Tobel*, for respondents.

PER CURIAM.—Appellant instituted a mandamus proceeding to compel respondents to provide office quarters and permit him to exercise the functions of the office of judge of the municipal court of the city of Seattle. From the judgment of the Superior court which dismissed his application he has appealed.

The case involves the constitutionality of the legislative act of March 17, 1897, abolishing municipal courts. The first contention is that the act (Session Laws 1897, p. 331; Bal. Code, § 762a) contains a plurality of subjects and that the title is not broad enough to cover the matter contained in the proviso. The title of the act is:

"An act to repeal an act entitled 'An act creating and establishing municipal courts in cities of the state of Washington, having more than twenty thousand inhabitants, defining and prescribing their jurisdiction, regulating their practice and procedure and providing judges and clerks therefor, and declaring an emergency,' approved February 28, 1891, and all acts amendatory thereof, and abolishing the courts and offices thereby created."

The act itself contains but a single section, which repeals the act of February 28, 1891, but provides for the continuance of the courts created by the act until January 1, 1898.

We think that there is but one subject in the act, viz., the abolishment of municipal courts. It provides that they shall be abolished and designates the time when the act shall become effective. This cannot be considered a violation of § 19, art. 2 of the constitution, providing,

“No bill shall embrace more than one subject, and that shall be expressed in the title.”

It is also urged that the act conflicts with § 8, art. 11 of the constitution, providing that,

“The salary of any county, city, town or municipal officer shall not be increased or diminished after his election or during his term of office; nor shall the term of any such officer be extended beyond the period for which he is elected or appointed.”

Appellant concedes the general proposition that the legislature may at will abolish an office of its own creation, but he insists that by virtue of the foregoing constitutional provision the office, in so far as the duration of the term and salary attaching to it are concerned, is a constitutional office. We think the language of the constitution determines the question against appellant. While it provides that the salary shall not be increased or diminished during the term, and also that the term shall not be *extended* beyond the period for which the officer is elected, it nowhere provides that the official term shall not be shortened. The express mention which the constitution makes of the one subject renders its silence as to the other very significant, and inasmuch as the constitution has not forbidden the shortening of a term, it cannot be said that a legislative enactment which has that effect is against the constitution.

The judgment is affirmed.

June, 1898.]

Opinion Per Curiam.

[No. 2884. Decided June 1, 1898.]

J. A. ROGERS, *Respondent*, v. J. M. TURNER, *Appellant*.

19	399
134	646

MORTGAGE FORECLOSURE—DEFICIENCY JUDGMENT—PLEADING.

A deficiency judgment is warranted, upon foreclosure of a mortgage, when the prayer of the complaint asks for judgment against defendant for the sum secured, that the mortgage be foreclosed, the premises sold and the proceeds applied upon the mortgage, and for general relief.

Appeal from Superior Court, Walla Walla County.—
Hon. THOMAS H. BRENTS, Judge. Affirmed.

J. W. Brooks, for appellant.

B. L. & J. L. Sharpstein, for respondent.

PER CURIAM.—This was an action to foreclose two real estate mortgages, and the defendant has appealed from a judgment against him for a deficiency remaining after the sale of the mortgaged premises. The sole ground of the appeal is that the complaint did not ask for a deficiency judgment nor any relief other than the foreclosure of the mortgages, but this contention is not sustained by the record as to one of the mortgages, being the one upon which the deficiency judgment was in effect rendered. As to this mortgage the plaintiff prayed for judgment against the defendant for the sum secured and also further asked that the mortgage be foreclosed and the premises sold and the proceeds applied upon the mortgage, and prayed for general relief. The decree contained a judgment against defendant for the amount due on this mortgage debt in accordance with the prayer and further provided that execution should issue for any part thereof which might remain unpaid after the sale of the mortgaged property, and the proper application of the proceeds. We think this

judgment was clearly authorized under the complaint and it is affirmed.

[No. 2836. Decided June 3, 1898.]

W. P. FULLER & Co. *et al.*, *Appellants*, v. AURELIUS
B. HULL, *Trustee, Respondent*.

FORECLOSURE OF MORTGAGE—JUDGMENT LIEN—TRANSCRIPT—EXECU-
TION FOR DEFICIENCY.

Under Code Proc., § 449, providing that a judgment lien shall attach from the date of judgment, if a transcript thereof be filed in the county auditor's office within twenty days, a decree of foreclosure becomes a lien upon the mortgagor's general realty for any deficiency after sale of the mortgaged premises from the day of its rendition, in case a transcript of the decree is filed within twenty days thereafter.

Where a general execution has been issued upon a decree of foreclosure, it will be presumed, in the absence of proof to the contrary, that the mortgaged premises were duly sold and the special writ therefor returned.

Under Code Proc., § 449, providing that the transcripts of judgments shall contain "the names at length of all the parties," it is necessary to include only the names of parties against whom a money judgment is rendered.

Appeal from Superior Court, Pierce County.—Hon.
THOMAS CARROLL, Judge. Affirmed.

Sharpstein & Blattner, for appellants.

Murry & Scott, for respondent.

The opinion of the court was delivered by

GORDON, J.—On the 23d of March, 1898, a judgment was entered in the superior court of Pierce county against Samuel Bertelson and Anna M. Bertelson for \$2,970, with interest and costs, and a decree rendered foreclosing a

June, 1898.] Opinion of the Court — GORDON, J.

mortgage given by them on certain real property, not the subject of this action. At the date of the rendition of such judgment and decree the Bertelsons also owned other real estate in said county, and on the 28th day of March, 1893, by their deed of warranty conveyed the premises here in controversy to Robert D. Duff and Alexander Bain. On the 12th of April, 1893, a transcript of the judgment entered in the foreclosure suit was filed and recorded in the office of the county auditor. On the 10th of June, 1893, Duff and Bain, their wives joining with them, executed a mortgage to the Tacoma Lumber & Mfg. Co. upon the premises involved in this action, to secure their promissory note in the sum of \$1,543.71. Thereafter, the last mentioned mortgage was foreclosed and the premises sold to C. A. Plummer, who subsequently assigned his certificate of purchase to the appellants herein. On May 8, 1895, the respondent, assignee of the judgment creditor, caused a writ of execution to issue out of said court for a balance on said judgment amounting to \$2,127.12. Under this execution the sheriff levied upon and sold the premises here in controversy and the respondent became the purchaser at such execution sale.

Appellants brought this action under § 529, 2 Hill's Code (Bal. Code, § 5500) to determine the title to the premises so sold and, the cause having been tried upon documentary evidence in the court below, judgment was rendered against them, and thereupon they appealed.

The first contention is that the judgment under and through which respondent claims was not a lien upon the premises in question at the time of the conveyance to Duff and Bain on March 28, 1893. It is admitted that a transcript of the judgment was filed with the auditor within twenty days after the judgment was rendered, and this

being true it follows that the contention is fully answered by § 449, 2 Hill's Code, which provides that

"The lien shall attach from the day of the date of said judgment, *if the said transcript shall have been filed within the said twenty days.*"

It is next urged that a judgment against mortgagors rendered in a decree of foreclosure does not become a lien upon the general property of the judgment debtors until after the mortgaged premises are exhausted and then only in the event that there is a deficiency. The position is not well taken. *Hays v. Miller*, 1 Wash. T. 143; *Shumway v. Orchard*, 12 Wash. 104 (40 Pac. 634); *Fletcher v. Holmes*, 25 Ind. 458. Appellants also urge that no general writ of execution can issue in any event until after a sale of the mortgaged premises and a return of the special writ. It is not necessary to determine that question, for there is nothing here to show that the general execution did issue before the sale of the mortgaged premises, and in the absence of proof to the contrary the presumption of regularity must obtain. In the present case the large credit upon the judgment, which appears from the general execution to have been made, strengthens the presumption that the mortgaged premises were duly sold and the proceeds credited.

The final contention is that the transcript of the judgment through which the respondent claims did not comply with the provisions of § 449, *supra*, in that it did not contain "the names at length of all the parties." It does, however, appear that the names of Samuel Bertelson and Anna M. Bertelson were shown by the transcript. They were the mortgagors and the only persons against whom a money judgment was rendered. No personal claim of any character was made against the other parties to the action, and it was not necessary that their names should have appeared upon the transcript.

June, 1898.]

Argument of Counsel.

Perceiving no error in the record the judgment of the superior court is affirmed.

DUNBAR and REAVIS, JJ., concur.

ANDERS, J., not sitting.

[No. 2890. Decided June 3, 1898.]

THOMAS CARSTENS *et al.*, Appellants, v. S. D. GUSTIN 19 408
22 62
et al., Respondents.

INTERPLEADER—WHEN LIES.

A complaint of interpleader does not state a cause of action, though alleging that plaintiffs hold a sum of money claimed by different parties, whose rights they desire adjudicated, when it further appears from the complaint that the money is the proceeds from the sale of a boom of logs, which had been levied upon by a judgment creditor of one of the parties in a logging firm, that the plaintiffs had set up a claim of ownership under a contract with the firm and given a bond for possession of the logs, and that, upon a trial of their claim, the judgment creditor had been given judgment against plaintiffs on their forthcoming bond for the value of the logs.

Appeal from Superior Court, King County.—Hon. WM. HICKMAN MOORE, Judge. Affirmed.

John E. Humphries, W. E. Humphrey, and E. P. Edsen, for appellants.

John G. Barnes, and W. W. Wilshire, for respondents:

The statutory proceedings provided for in 2 Hill's Code, §§ 153-155 (Bal. Code, §§ 4843-4845) takes the place of a bill of interpleader in equity, and the action is governed by the same rules that govern such a bill. *Washington Ins. Co. v. Lawrence*, 28 How. Pr. 435; *Cady v. Potter*, 55 Barb. 463; *Board of Education v. Scoville*, 13 Kan. 17;

St. Louis Life Ins. Co. v. Alliance Mutual Life Ins. Co., 23 Minn. 7; *Johnson v. Maxey*, 43 Ala. 521.

If plaintiff is liable to different claimants, even though it be for the same demand, there is no case for a bill of interpleader. *Greene v. Mumford*, 4 R. I. 313; *Crawford v. Fisher*, 1 Hare, 436; *Pfister v. Wade*, 56 Cal. 43.

In order to be entitled to maintain interpleader, the plaintiff must claim no interest himself in the thing in dispute. He must occupy the position of a stakeholder. He must stand entirely indifferent between the conflicting claimants. He cannot mingle up a demand of his own upon the property or fund with the demand that the other persons shall interplead. 3 Pomeroy, Equity Jurisprudence (1st ed.) § 1325; *Adams v. Dixon*, 19 Ga. 513 (65 Am. Dec. 608); *Cullen v. Dawson*, 24 Minn. 66; *Lozier's Exr's v. Van Saun's Adm'rs*, 3 N.J.Eq.325; *Lincoln v. Rutland & B. R. R. Co.*, 24 Vt. 639; *North Pacific Lumber Co. v. Lang*, 42 Pac. 801 (52 Am. St. Rep. 780.)

The opinion of the court was delivered by

REAVIS, J.—The appellants commenced an action, denominating their complaint an interpleader. It states in substance that Thomas and Ernest Carstens were a partnership known as Carstens Brothers and that the defendants Skavdale and Thomas L. and M. L. Jose were in partnership under the firm name of Saginaw Logging Company, and that defendant Moyer was sheriff of King county; that the defendants Gustin and wife and Tibbetts were partners under the firm name of Gustin & Tibbetts; that prior to June 18, 1896, Gustin & Tibbetts recovered judgment in the superior court against Thomas L. Jose, which was duly entered of record as unpaid in said court; that plaintiffs, Carstens Brothers, entered into a

June, 1898.] Opinion of the Court — REAVIS, J.

contract on the 18th of June, 1896, with the Saginaw Logging Company, by the terms of which Carstens Brothers were to furnish money and supplies necessary to get out logs and carry on the business of the logging company and to sell the logs and pay themselves for all money expended under the contract and return the surplus to the Saginaw Logging Company, and the agreement, which is in writing, is set out; that the Saginaw Logging Company was indebted to Carstens Brothers in large sums; that the company prior to May 24, 1897, secured and got out a boom of logs under the contract with Carstens Brothers of the value of \$1,200; that the logs were taken possession of by Carstens Brothers who exercised acts of ownership over them; that at this time the judgment creditors, Gustin & Tibbetts, had an execution issued upon their judgment against Thomas Jose, which was levied by defendant Moyer, as sheriff, upon the boom of logs; that the sheriff took possession of all the logs; that Carstens Brothers demanded possession of the logs of the sheriff, which was refused; that they then filed their affidavit of claim of ownership under § 491, 2 Hill's Code (Bal. Code, § 5262) and executed and delivered a bond to Moyer, the sheriff; that the cause was regularly docketed and heard in the court; that judgment was rendered against Carstens Brothers and their sureties on the bond in the sum of \$1,200; and that such judgment is unsatisfied. It is also stated that all the defendants except Moyer are insolvent and that the plaintiffs Carstens Brothers sold the logs for the sum of \$1,200, and now have the money in place of the logs. And it is also stated that the members of defendant Saginaw Logging Company claim they are entitled to the money; that if the logs are not the property of Carstens Brothers they are the property of the Saginaw Logging Company, and that said company is

either entitled to the logs or the money for the same; and that Carstens Brothers claim that they are either entitled to the money or to hold the claim for the same against the Saginaw Logging Company. It is also stated that Thomas Jose is indebted to the Saginaw Logging Company, and after payment of the partnership debts there will be no sum due him from the firm, and that at the time the levy was made upon the logs by the sheriff his partnership debts were greatly in excess of the property of the partnership, and there was nothing due for the individual creditors of Thomas Jose. Plaintiffs state they are willing to pay the moneys over to the parties entitled thereto and ask that all the defendants be brought into court and required to have their rights and claims adjusted, and the court determine to whom the money shall be paid. The defendants, sheriff, Gustin & Tibbetts, Skavdale and Jose, filed separate demurrers to the complaint on the ground that it did not state a cause of action, and the demurrers were sustained by the superior court.

The plaintiffs Carstens Brothers are in no other or different position than they were when they claimed the boom of logs as against the levy of the sheriff. They made their claim under their contract with the Saginaw Logging Company as the owners of the logs. A trial was had, and it was determined that they were not the owners of the logs, but that such logs were subject to the execution of Gustin & Tibbetts against Thomas Jose. The money which Carstens Brothers have in their hands merely stands in place of the logs, and, as between them and Gustin & Tibbetts, the judgment of the court was they should pay the \$1,200. The unadjusted matters as between the Saginaw Logging Company and Carstens Brothers cannot concern Gustin & Tibbetts, who were adjudged to be entitled to the proceeds from the boom of logs, viz., the \$1,200. There does not

June, 1898.] Opinion of the Court—DUNBAR, J.

seem to be any element of intervention in the complaint and the judgment of the superior court is affirmed.

DUNBAR and GORDON, JJ., concur.

[No. 2856. Decided June 7, 1898.]

TOWNSEND GAS AND ELECTRIC COMPANY, *Respondent*,
v. CITY OF PORT TOWNSEND, *Appellant*.

MUNICIPAL CORPORATIONS—CHARTER POWERS AND RESTRICTIONS—
STREET LIGHTING CONTRACTS.

19	407
124	472
19	407
37	41

Where a city is given power by its charter, without restriction, to provide for lighting the streets and furnishing the city with lights, a further provision of the charter fixing a method of levying an annual tax to pay for the same must be construed as an enlargement of the right of the city to provide funds therefor and not as a restriction upon the power conferred, which would confine the city's lighting contracts to annual periods.

Appeal from Superior Court, Jefferson County.—Hon. J. G. McCLINTON, Judge. Affirmed.

S. A. Plumley, for appellant.

Harry Ballinger, and *Robert W. Jennings*, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—On the 15th day of February, 1893, the respondent entered into a contract with the city of Port Townsend, a municipal corporation, created and existing under an act of the legislative assembly of the territory of Washington, for the lighting of the streets of said city with electric lights for the period of five years. The payments were made according to contract for two years, since which time no payments have been made, and this

action was brought to enforce the same. A demurrer was interposed to the complaint, which was overruled, and the appellant, standing on its demurrer, brings the case to this court.

It is contended by the appellant that the action of the city authorities was *ultra vires* by reason of § 6 of the charter of Port Townsend. Said section is as follows:

“The city of Port Townsend has power to provide for the lighting of the streets and furnishing the city with gas or lights, and for the erection and construction of such works as may be necessary or convenient therefor; and has power to levy and collect for these objects a special tax not exceeding one-fifth of one per centum per annum upon the taxable property within the limits of the benefits of such lights, which limits shall be fixed by the city council each year before levying any tax authorized by this section, and all such taxes shall only be assessed upon and collected from property within said limits.”

It is contended by the appellant that the charter provisions set forth above constituted the only authority vested in the city council to provide for lighting the streets, and that that portion of § 6 of the charter providing that the city council should each year fix the limits of the benefits of lights, creating a light district within which a special tax shall be levied for such purpose, and the further provision in § 107, providing for a vote of the people, constitute a limitation of the power granted by the first portion of § 6.

The contention of the respondent is two-fold: First, that the power to provide for the lighting of its streets is expressly conferred upon the city, and that the latter part of the section is an enlargement of the right of the city to provide funds therefor and not a restriction upon the power conferred; and, second, that if it were held that the clause cited is restrictive, it is not a restriction upon the

power to contract for street lighting, but only on the manner of providing for the payment of the sums payable under the contract. It is further contended that the city having made a contract and having received the benefit of that contract, it will not now be heard to say that it had no power to enter into such contract in the particular way in which it did.

It is not necessary to pass upon this last proposition, as an investigation of all the charter provisions of the city of Port Townsend, found on page 115 and following pages of the laws of 1881, convinces us that the latter part of § 6 is not a restriction upon the right of the city to contract for lighting the streets, but is simply an addition to the general powers given, or rather a way pointed out for paying for the lighting of the streets which the city may avail itself of, if it sees fit. The provisions in this section are very much of the character of the provisions in the other sections. For instance, in § 7 the power is given to the city, among other things, to provide for constructing sewers and cleaning and repairing the same, and then follows the power to assess taxes in a certain prescribed way for the payment of the construction of sewers, etc. The power to construct sewers and to keep them in repair is certainly an inherent power in the city and therefore a power which the city would have the right to exercise in the absence of a charter declaration; and it certainly was not the intention of the charter to abridge this right or to make it depend absolutely upon the provisions following for the collection of taxes.

This case falls squarely within the rule announced in *Portland Lumbering & Manufacturing Co. v. East Portland*, 18 Ore. 21, which was favorably commented upon by this court in *Soule v. Seattle*, 6 Wash. 315. The provisions of the charter of East Portland were almost synon-

ymous, so far as the principles involved are concerned, with the provisions in the charter of Port Townsend. In that case the court in its opinion said:

"The power and duty is enjoined upon the common council of the city to improve the streets and to keep them in a suitable state of repair. Permission is given to levy the cost of such improvement on the adjacent property, but it is nowhere declared in the charter that it must do it in that way, or that it is precluded from doing it in any other."

And so in this case. Permission being given in unequivocal terms to the city to provide for the lighting of the streets, and no restrictive language being used concerning the payment for such services, we think the latter part of the provision in relation to the special tax must be construed to be permissive only.

The judgment will therefore be affirmed.

SCOTT, C. J., and GORDON, ANDERS and REAVIS, JJ.,
concur.

[No. 2913. Decided June 7, 1898.]

THE STATE OF WASHINGTON, *Respondent*, v. ISAAC
JOHNSON AND NICK SHY, *Appellants*.

ROBBERY — SUFFICIENCY OF INFORMATION — DESCRIPTION OF PROPERTY
TAKEN — INSTRUCTIONS.

In an information charging robbery of money it is sufficient to describe the property taken as lawful money, without any further designation thereof, under Code Proc., § 1253 (Bal. Code, § 6859) which provides that in an indictment or information for larceny or embezzlement of money, it is sufficient to allege the larceny or embezzlement to be of money, without specifying the coin, number, denomination or kind thereof.

19	410
20	208
19	410
22	568
19	410
24	51
24	53
19	410
40	617

June, 1898.] Opinion of the Court—DUNBAR, J.

An instruction charging the jury to bring in a verdict for defendants unless they find that defendants forcibly took from the person of the prosecuting witness lawful money of the United States belonging to him, with the intent to convert the same to their own use against the will of said prosecuting witness, is sufficient, as the words used are equivalent to describing the act as feloniously done.

No error can be predicated upon the court's omission to define the phrase "reasonable doubt," when there is no request therefor.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

William Parmerlee (Hart & Parmerlee, of counsel), for appellants.

James F. McElroy, John B. Hart, and Walter S. Fulton, for The State.

The opinion of the court was delivered by

DUNBAR, J.—The appellants were convicted of robbery under an information the essential parts of which are as follows:

"They, the said Isaac Johnson and Nick Shty, in the county of King, state of Washington, on the 10th day of January, A. D. 1898, unlawfully, wilfully, forcibly, feloniously and by violence and putting in fear one John Adams, did then and there forcibly and feloniously take from the person of said John Adams certain articles of value, to-wit: Seventy-five dollars in money of the United States, the same being of the value of seventy-five dollars in the lawful money of the United States and the same being the personal goods and property of the said John Adams."

A demurrer was interposed to this indictment, which was overruled by the court, and the action of the court in overruling the demurrer is the first assignment of error here, the contention being that the information does not in any manner designate or specify the coin, number, or

denomination or kind of money alleged to have been taken. It may be conceded that at common law this information would not have been good, but we think the objection has been obviated by statute.

Section 1253 of the Code of Procedure (Bal. Code, § 6859) provides that,

“In an indictment or information for larceny or embezzlement of money, bank notes, certificates of stock or valuable securities, or for a conspiracy to cheat or defraud a person of any such property, it is sufficient to allege the larceny or embezzlement, or the conspiracy to cheat and defraud, to be of money, bank notes, certificates of stock, or valuable securities, without specifying the coin, number, denomination or kind thereof.”

It is contended by the appellants that the common law requirement has not been changed by statute so far as indictments for robbery are concerned, but that the statute applies only to informations for larceny or embezzlement. We do not think that this restricted construction can logically be placed upon the statute. Robbery is larceny with the element of force added. Mr. Bishop, in his work on Criminal Law, in Vol. 2 (8th ed.) § 1159, says:

“Robbery charges a larceny together with the aggravating manner which makes it, in the particular instance, robbery. For example, the property is described the same as in larceny; the ownership is in the same way set out, and so of the rest.”

We think the indisputable fact that robbery is a larceny of an aggravated kind would be a sufficient answer to appellants' contention in this respect, but it has also been held that,

“It is a principle of interpretation that what is newly created by statute has the same incidents as if it existed at the common law. Therefore if a statute makes it larceny to steal a thing not the subject of larceny at the common law, it is by legal consequence robbery to take this thing

June, 1898.] Opinion of the Court—DUNBAR, J.

forcibly from the person of one put in fear.” 2 Bishop, New Criminal Law, § 1160.

It follows that to determine the sufficiency of the description of the stolen money we must inquire as to the particularity of the description required in charges of larceny; and, as we have before seen, in a charge of larceny, under the statute, the indictment is sufficient.

It has been held, in accordance with this rule, in *Brennon v. State*, 25 Ind. 403, that,

“in an indictment for robbery the description of the property taken need not be more particular than is required in charging a larceny.”

And so to the same effect is *McEntee v. State*, 24 Wis. 43, where a great many cases are cited in support of the announcement.

The same rule is substantially announced by Bishop on Statutory Crimes (2d ed.) § 139.

We think no error was committed by the court in overruling the demurrer.

It is also contended that the court erred in eliminating the question of larceny from its instructions to the jury. We think in this instance that the omission was harmless, for the reason that the court instructed the jury that if they found that the defendants did not forcibly take the money from the prosecuting witness, their verdict should be not guilty. The instruction was as follows:

“Unless you are convinced from the evidence to a moral certainty and beyond any reasonable doubt that in King County, state of Washington, during the month of January, 1898, and on or about the 10th day of said month, defendants forcibly took from the person of the prosecuting witness Adams at least some of the lawful money of the United States mentioned in the information, and that said money, if such there actually was, was the money of said Adams, and that defendants then and there forcibly took the same, with the intent to convert the same to their

own use, against the will of said Adams, then your verdict must be for defendants; that is, not guilty.”

The court continuing said:

“ If the jury believe from the evidence that there was no offense in this cause on the part of defendants other than the mere stealing of money or snatching the same from the person of Mr. Adams, without resistance on his part, then your verdict will be for defendants. Unless witness Adams resisted the efforts of the defendants to get his money, if such effort there was, and such resistance was overcome by force, there must be no conviction in this case.”

So that it will be seen that the instruction of the court was more beneficial to the defendants than the instruction asked of the court, in their behalf. The word “ feloniously,” omitted from the instruction, we think was covered by the words used in the instruction.

The court not having been requested to define the phrase “ reasonable doubt,” no error can be predicated upon its omission to do so. So far as the distinctions between robbery and larceny are concerned, in this case the undisputed testimony shows that if a crime was committed at all it was the crime of robbery.

The judgment will be affirmed.

SCOTT, C. J., and ANDERS, GORDON and REAVIS, JJ.,
concur.

June, 1898.] Opinion of the Court—SCOTT, C. J.

[No. 2957. Decided June 7, 1898.]

19 415
33 532

JAMES P. TOWNSEND, *Respondent*, v. E. B. PRICE, *as Administrator, Appellant*.

JUDGMENT AGAINST INSANE PERSON—GUARDIAN AD LITEM—PLEADING.

Where plaintiff knows, either at the time of service of summons or at the time of rendition of judgment that defendant is *non compos mentis* it is incumbent on him to suggest it to the court, in order that a guardian *ad litem* may be appointed.

In an action upon a judgment of a court of record of a sister state, an answer alleging that the judgment had been obtained fraudulently by default, through personal service upon defendant while insane, and that there was a valid defense to the original action, states sufficient facts to constitute a defense, as against a motion for judgment on the pleadings, as pleadings are liberally construed upon such a motion.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Reversed.

James M. Epler, for appellant.

Smith & Cole, for respondent.

The opinion of the court was delivered by

SCOTT, C. J.—This was an action on a judgment, recovered in a court of record in the state of Missouri, brought by the plaintiff, as assignee of the plaintiff in that action, against the defendant, as administrator of the estate of the deceased judgment debtor. Judgment was rendered against the defendant in this action on the ground of the insufficiency of the answer. It will not be necessary to give the answer in detail, as it is conceded that it sets forth that when process was served on the defendant in the state of Missouri he was confined to his bed in his last sickness and was not in a condition to attend to any business and was *non compos mentis*, and that this fact was

known to the plaintiff, and that judgment was taken against him by default; and furthermore that there was a good defense to the cause of action pleaded on the ground that the plaintiff had never rendered the services for the value of which he had sued, and it was alleged that the judgment was fraudulently procured. After the filing of the answer the plaintiff moved for a judgment on the pleadings, which was granted, and this appeal was taken therefrom. It is contended by the respondent and not disputed by the appellant that service might be regularly made upon an insane person, and we are of the opinion that the judgment obtained from such service is not void, but voidable merely. The main contention of the respondent seems to be that the fraud alleged was one which should have been pleaded in the original action, viz., that the services had not been rendered and that it could not be taken advantage of in a subsequent action upon the judgment. But, conceding this to be true, the answer here goes further and alleges fraud in obtaining the judgment by reason of the fact of the condition of the defendant, and it was a necessary allegation in connection with that defense to show that the claim was unfounded, or at least that there was a defense thereto, in whole or in part. If the physical and mental condition of said defendant was known to the plaintiff, as is alleged in the answer, both at the time service was obtained and when judgment was rendered, it was incumbent on the plaintiff then to have suggested it to the court, in order that a guardian *ad litem* might be appointed. It is also urged here that the answer is insufficient because it does not allege that a guardian *ad litem* had not been appointed. But the point seems to have received but minor consideration from both sides. It raises an important question of practice as to where the burden of proof rested; whether, where it was shown that the defendant was insane,

June, 1898.] Opinion of the Court—SCOTT, C. J.

and this fact was known to the plaintiff, it then became necessary for the plaintiff to show that the judgment was regularly obtained by the appointment of a guardian *ad litem*, or whether it was necessary for the defendant to allege and prove the contrary. As it does not appear to have been fully briefed, and its decision not being necessary now, we pass it, for we are of the opinion that as against the motion for a judgment on the pleadings, there were sufficient allegations in the answer to admit proof of the fact that no guardian *ad litem* was appointed, if it was incumbent on the defendant to make that proof, for the answer admits only a service upon the defendant personally, and the complaint alleges nothing more; also the answer contains the further allegation that the judgment was taken against the defendant by default. If the answer had been demurred to and the fact brought specially to the attention of the court, and the defendant, that the answer was defective for the reason that it did not contain a direct allegation that a guardian *ad litem* had not been appointed, and it was incumbent on the defendant to make that allegation and proof, in the interest of good pleading the demurrer should have been sustained. But if that were done, the right to amend would have followed as a matter of course. As against a motion for a judgment upon the pleadings a different rule obtains, and they are more liberally construed in favor of a party against whom such action is sought. This has been laid down in a number of decisions by this court, and as against this motion we are of the opinion that the answer stated a defense, and the action of the court in holding otherwise upon the motion was erroneous.

Reversed and remanded for a new trial.

GORDON, DUNBAR and REAVIS, JJ., concur.

ANDERS, J., not sitting.

27—19 WASH.

[No. 2927. Decided June 10, 1898.]

SPOKANE COUNTY, *Respondent*, v. DAVID S. PRESCOTT
et al., *Appellants*.

OFFICIAL BONDS—ACTION ON—STATUTE OF LIMITATIONS—LEAVE OF
 COURT TO SUE.

Where the duties of a public officer are prescribed by statute, and to secure their proper performance an official bond is given by him, such bond creates no obligation in itself, but merely operates as collateral security for the proper discharge of his official duties; and an action on the bond on account of a breach of official duty would not be an action on a written contract, and would, consequently, be barred under the statutory limitation of three years upon the commencement of actions "upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument."

The disability to begin action upon an official bond, imposed by § 5686, Bal. Code, until leave of court shall be obtained therefor, would not enlarge the statute of limitations, when the plaintiff had the option at any time to obtain leave of court to bring its action, and the failure to obtain leave was due to its own delinquency.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Reversed.

Graves, Wolf & Graves, and *Danson & Huneke*, for appellants.

John A. Pierce, Prosecuting Attorney, *Harris Baldwin*, and *F. M. Ellsworth*, for respondent.

The opinion of the court was delivered by

REAVIS, J.—Appellant Prescott was treasurer of Spokane county from January 9, 1893, until January 14, 1895. Prior to entering upon his official duties, he executed an official bond, which was duly approved by the board of county commissioners. On January 14, 1895, it was his

19	418
26	500
26	502
26	505
19	418
26	208
26	209

June, 1898.] Opinion of the Court—REAVIS, J.

duty, as county treasurer, to pay to his successor in office the sum of \$72,837.78. He paid to his successor only \$19,631.65. There was due from him to the county at that date the sum of \$53,206.13. The respondent filed its complaint on the 27th day of January, 1898, in the superior court, in substance stating the above facts, and on the same day obtained leave from the superior court to bring the suit. Appellants Prescott and his sureties on his official bond demurred to the complaint, stating as ground for the demurrer that the action was not commenced within the time limited by law. The demurrer was overruled, and appellants then answered, alleging that the cause of action accrued on January 14, 1895, and that the action was not commenced until January 27, 1898; that respondent did not apply to the court for leave to bring such action until January 27, 1898; and that it was within the statute of limitations. Respondent interposed a demurrer to the answer, which was sustained, and judgment was entered as prayed in the complaint. The appeal is from this judgment. The appellant Prescott appeared separately, and the sureties appeared together.

Counsel for respondent maintain that the limitation applicable to the action is found in subdivision 2, § 4798, Bal. Code (2 Hill's Code, § 113) as follows:

“ Within six years: An action upon a contract in writing, or liability express or implied arising out of a written agreement.”

Appellants contend that the limitation applicable to the action is found in § 4800, Bal. Code (2 Hill's Code, § 115), as follows:

“ Within three years: . . . An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument.”

The solution of this controversy requires an answer to two questions: First, Is the principal (the treasurer) sued upon a contract, and, if so, where is the contract found, and what is the evidence of it? Second, Upon what liability is the action maintained, and does it arise out of the official bond of the treasurer? Is it sufficient that the contractual relation between the parties may have had its origin in a written agreement, though the liability sought to be enforced arises from extraneous matters, or must the liability arise directly upon the written agreement?

In *Chipman v. Morrill*, 20 Cal. 137, Mr. Justice FIELD, discussing this question, says:

"The statute provides that 'an action founded upon any contract, obligation, or liability founded upon an instrument of writing,' except in certain designated cases, shall be commenced within four years, and an action upon a contract, obligation, or liability not thus founded, with certain exceptions, shall be commenced within two years. . . . The statute by the language in question refers to contracts, obligations, or liabilities resting in, or growing out of, written instruments, not remotely or ultimately, but immediately; that is, to such contracts, obligations, or liabilities as arise from instruments of writing executed by the parties who are sought to be charged in favor of those who seek to enforce the contracts, obligations, or liabilities. The construction would be the same if the word 'founded' were omitted, and the statute read 'upon any contract, obligation, or liability upon an instrument of writing.' "

The statute of this state prescribes the duties of the county treasurer. The essence of this action is for the breach of those statutory duties imposed upon the treasurer. His duties under the statute were not contractual. Here, at any rate, is an express obligation imposed, and an express liability for the breach of the obligation. The bond set out in the complaint is the statutory bond which the treasurer is required to execute, together with his sureties. The condition recited in the bond is as follows:

June, 1898.] Opinion of the Court — REAVIS, J.

“The condition of the above obligation is such that, whereas the above-bounden principal . . . was . . . elected to the office of treasurer of Spokane county: . . . Now, therefore, the condition of this obligation is such that if the said David S. Prescott shall well, truly and faithfully perform all official duties now required of him, and shall well, truly and faithfully execute and perform all the duties of such office of treasurer of Spokane county required by any law to be enacted subsequently to the execution of this bond, then this obligation is to be void and of no effect; otherwise, to remain in full force and virtue.”

Manifestly, in conformity to well-recognized legal principles, no action can be maintained against the sureties unless the liability of the principal exists at the time of the commencement of the action. One of the duties of the treasurer required by the statute was the payment of the money in his possession belonging to the county to his successor in office. The liability arose when he neglected or refused to make such payment. Certainly, the cause of action accrued at that date. The undertaking of the sureties was collateral security for the performance of the duties of their principal. The bond itself is security that an officer will discharge his duties. His failure to discharge them is a breach of a statutory duty. The bond does not impose any obligation upon him different from that created by the statute. If he had executed no bond, but had assumed the functions of the office, and collected moneys, the duty would still be imposed upon him to pay them over to his successor. The bond is collateral security, as set forth in *Walton v. United States*, 9 Wheat. 656. *State v. Conway*, 18 Ohio, 235, was an action to have execution upon a judgment rendered against a former sheriff and the sureties upon his official bond, where the plea of the statute of limitations was interposed. The court observed:

“The actual cause of action is not the execution of the bond (that is more in the nature of a collateral security);

but the cause of action is the misfeasance—the false return. Without proof of the false return, there could be no recovery. The action is, in effect, although not so in form, an action against an officer for misfeasance in office. So far as actions of this character are concerned, the limitation acts upon the cause, not the form, of action. And the effect of the statute cannot be evaded by any change in the form of action.”

The principle is reaffirmed and restated in *State v. Blake*, 2 Ohio St. 147. That was an action upon the official bond of the county auditor, and the cause of action was losses to the county in a large amount by reason of a dereliction of duty on the part of the officer. The supreme court of Kansas, in *Ryus v. Gruble*, 31 Kan. 767 (3 Pac. 518), in an action upon a sheriff's bond to recover damages for the levy of a void execution, said:

“As before stated, the wrongs committed by the defendant are the real and substantial foundation for the plaintiff's cause of action, and the sheriff's bond is virtually only a collateral security for the enforcement of such cause of action. The bond does not give the cause of action; the wrongs or delicts do; and the bond simply furnishes security to indemnify the persons who suffer by reason of such wrongs or delicts. . . . Whenever a cause of action is barred by any statute of limitations, the right to maintain an action therefor upon a bond which simply operates as a security for the same thing must necessarily cease to exist. When the principal debt or cause of action fails, the security must also fail.”

These conclusions are also affirmed in the same court in *Provident Loan & Trust Co. v. Walcott*, 5 Kan. App. 473 (47 Pac. 9), and the principle stated in *Davis v. Clark* (Kan. Sup.), 49 Pac. 667; *Commissioners v. Van Slyck*, 52 Kan. 622 (35 Pac. 299); *Mount v. Lakeman*, 21 Ohio St. 643; *State v. Kelly*, 32 Ohio St. 430; *Dawes v. Shed*, 15 Mass. 6 (8 Am. Dec. 80); *Allen v. State*, 6 Kan. App.

June, 1898.] Opinion of the Court — REAVIS, J.

915 (51 Pac. 572); *Ware v. State*, 74 Ind. 181; *Whitney v. Gammon*, 103 Iowa, 363 (72 N. W. 552). If the bond be merely collateral security for the performance of the principal contract, and is not itself the original contract, then the question here in controversy is illustrated by reference to the rules controlling principal and suretyship. In states where a mortgage conveys the fee to the mortgagee, an action upon the mortgage is not barred, though the debt may be; but whereas in this state the mortgage creates a lien only, and is an incident to, and collateral security for, the debt, when the principal (the debt) is barred, no action can be maintained upon the mortgage itself (the collateral security for the debt). 2 Jones, Mortgages (5th ed.) § 1207; *Van Eaton v. Napier*, 63 Miss. 222. .

But counsel for respondent propound the question: "Could this action exist if the bond did not also exist?" Certainly not against the sureties; but, as we have seen, their undertaking is collateral security for the obligation imposed upon their principal. The bond here, as has been observed, is the statutory one. There are no voluntary or special covenants contained in it. It is an agreement that the principal will perform his statutory duties; nothing more. The case of *Kenton County v. Lowe*, 91 Ky. 367 (16 S. W. 82), in the court of appeals of the state of Kentucky, was an action brought against a sheriff as principal and his sureties to recover money collected by the sheriff as tax collector, and by him withheld. The Kentucky statute required the sheriff to execute with sureties an official bond to faithfully discharge the duties of his office, and to pay over to such persons and at such times as they might be respectively entitled to the same all moneys that might come into his hands as sheriff. He was further required to give a special bond before proceeding to collect certain taxes. He failed to execute the special bond, but,

nevertheless, collected taxes, and failed to account. The statute further made the sureties on his general official bond liable for moneys for which he failed to account. There seems to have been a special covenant here to pay the taxes; that is, the sheriff did not give the special statutory bond before collecting the taxes, but himself and sureties were liable upon his general bond as a voluntary bond at common law by virtue of the special covenant to pay over all moneys that might come to the principal's hands in his official capacity. However, the case does not fully discuss or state the reasoning by which the court reached its conclusion. Counsel for respondent also cite *State v. Murphy* (Nev.) 48 Pac. 628. The action there was upon a bail bond, but the Nevada court distinguishes the case from those of *Ryus v. Gruble*, *supra*, and other cases of the same character, and approves them. The distinction can readily be perceived between an official bond with surety for the discharge of statutory duties and a voluntary bond executed in consideration of an appeal or in consideration of bail. In the former case the obligation arises upon the duties imposed by the statute; in the latter there is no obligation other than that created by the bond itself.

Another contention is made by respondent that it was under disability until authority was procured from the superior court to commence this action. But we do not think the statute of limitations was enlarged by the failure of respondent to obtain leave of court, under § 5686, Bal. Code (2 Hill's Code, § 696), which requires leave from the court where the action is commenced. There are some authorities cited by respondent which sustain this contention, but some of the cases, notably those in 16 and 24 Minn. (*Wood v. Myrick*, 16 Minn. 494; *Lanier v. Irvine*, 24 Minn. 116), seem to have been overruled by that court

June, 1898.]

Syllabus.

in *Litchfield v. McDonald*, 35 Minn. 167 (28 N. W. 191). *Baker v. Johnson County*, 33 Iowa, 151; *Palmer v. Palmer*, 36 Mich. 489 (24 Am. Rep. 605). The weight of authority and reason seems to be that when the respondent had the option at any time to obtain leave of court to bring its action, and did not ask for such leave, it cannot enlarge the statute of limitations by its own delinquency.

The contention of appellants that § 5686, Bal. Code, *supra*, is repealed by subsequent legislation, is not decided here. Upon the record here, the judgment of the superior court is reversed, and the cause remanded for further proceedings in conformity to this opinion.

SCOTT, C. J., and ANDERS, GORDON and DUNBAR, JJ., concur.

[No. 2887. Decided June 13, 1898.]

19	425
630	181
630	132

J. Q. ADAMS *et al.*, Appellants, v. E. AMES, Respondent.

SALES—FAILURE TO EXECUTE CONTRACT—PREVENTION BY ACT OF GOD.

In an action to recover the value of a quantity of oats which the owner had agreed, by executory contract, to sell plaintiff, the oats to be removed within a specified time, "wind, tide and other acts of God permitting," the plaintiff should be non-suited when it appears from the testimony that the plaintiff was prevented on but one occasion from removing the oats by the act of God, and there is no showing that the act of God intervened to prevent removal during the whole time of the life of the contract.

Appeal from Superior Court, Skagit County.—Hon. J. P. HOUSER, Judge. Affirmed.

Hastings & Stedman, for appellants.

Sinclair & Smith, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—On September 24, 1896, the following contract was entered into between the appellants and the respondent:

“I have this day sold to J. Q. Adams & Co. 60 or 70 tons of good merchantable white oats (like sample) for \$12 per ton, delivered to such steamboat, scow or other common carrier, which shall be sent by J. Q. Adams & Co. to warehouse located on Joe Lawry's Slough. J. Q. Adams & Co. agrees to remove said 60 or 70 tons of oats within 15 days from date, wind, tide and other acts of God permitting. I hereby accept as part payment on above contract.dollars, and do hereby certify that I am the sole owner of said 60 or 70 tons of oats, and that there are no prior liens or incumbrances upon said oats.

Dated at La Conner, Wash., September 24, 1896.

E. Ames.”

Across face is written,

“Accepted, J. Q. Adams & Co., E. Cardin, Manager.”

An advance was offered, but refused. On the 3d of October a boat was sent for the oats and it was found impossible to get to defendant's barn. On October 5 another futile attempt was made to reach defendant's barn. On the 9th, the day on which the contract expired, the appellants' agent went to the respondent's house and asked him to extend the time, which respondent refused to do. On the 12th of October the appellants sent a boat and demanded the oats of the respondent, who refused to deliver them. Oats in the meanwhile were advancing in price. Suit was then brought for the value of the oats. On the termination of the appellants' evidence the court held that there was an utter failure of proof, and a nonsuit was granted.

As we view the testimony in this case it is not necessary to discuss the first and second errors assigned by the appellants. We think the motion for a nonsuit was properly

June, 1898.] Opinion of the Court—DUNBAR, J.

granted. Waiving the first contention of the respondent that the contract was void for want of mutuality and that the document therefore did not constitute a good contract, we are satisfied that the contract was an executory one and the appellants' right to recover was subject to the performance of certain conditions precedent, viz., the payment for, and the removal of, the oats within fifteen days from the date of the contract. The act of God was appellants' only defense for not complying with the contract. It may be possible that on one occasion when the boat was started for the slough it was the act of God that prevented it by increasing the winds; on the other occasion it was an aggregation of logs in the slough which prevented the boat from reaching the barn. But it does not appear from the testimony, although it is asserted in the brief, that on any other occasion during the fifteen days it was impossible for a boat to traverse the slough. Neither did it appear from the testimony that any boat but the particular boat sent could not have reached defendant's barn. Neither does it appear from the testimony that the oats could not have been removed by wagon or some other conveyance. It may be a fact that the respondent's farm was so situated that the oats could only be removed by boat, but no such testimony appears in the record. The court has no knowledge of the topography of that country, and, if it had, could not take judicial notice of it. We think there was an absolute failure of proof and that the nonsuit was properly granted. The judgment will therefore be affirmed.

SCOTT, C. J., and ANDERS, GORDON and REAVIS, JJ.,
concur.

[No. 2986. Decided June 13, 1898.]

THE STATE OF WASHINGTON, *on the Relation of Gatzert-Schwabacher Land Company*, v. ROBERT BRIDGES,
as Commissioner of Public Lands, et al.

TIDE LANDS—EXTENSION OF STREETS OVER—LIMITATION OF RIGHT—
CONSTITUTIONAL LAW.

The right given municipal corporations, by art. 15, § 3, of the state constitution, to extend their streets over tide lands to and across the harbor areas reserved for purposes of commerce and navigation is not a continuing one; and where a city, at the time of platting the tide lands by the state, exercises its right under said constitutional provision by filing a plat extending every alternate street across the tide land, it is precluded from thereafter exercising the right of extending the remaining streets across the intervening tide lands, except by condemnation and payment. (REAVIS, J., dissents.)

Original Application for Mandamus.

Preston & Gilman, for relator.

Thomas M. Vance, for respondents.

The opinion of the court was delivered by

SCOTT, C. J.—In 1896 the relator, as upland owner, applied to purchase certain tide lands including the north half of lot 7, block 176, in front of the city of Seattle, and duly received a conveyance of the same from the state. Thereafter, as the owner of said north half of lot 7, the relator applied to the respondents for a lease for thirty years of a certain portion of the harbor area of the city of Seattle contiguous to said half lot, and, the application being refused, a writ of mandate is sought to compel the execution of the lease. There is no question as to the regularity of the relator's application for a lease or of its preference right thereto, if anyone is entitled to lease the

June, 1898.] Opinion of the Court—SCOTT, C. J.

tract, but the same was denied on the ground that said half of lot 7 would be a part of Union street if the same were extended; and the respondents were of the opinion that they had no authority to lease it. That the conveyance of said half of lot 7 by the state to the relator was invalid on the ground that there was no authority or power to execute the same, and that the relator had no title thereto, and that is the sole question to be determined. The constitution, art. 15, § 3, provides that "Municipal corporations shall have the right to extend their streets over intervening tide lands to and across the area reserved as herein provided," and the respondents contend that under this provision the right to extend streets across tide lands and harbor areas, without making payment therefor or exercising the right to condemn, is a continuing one and that, if streets could not be extended except by condemnation and payment, the provision does not mean anything because municipal corporations have that right without it.

It will be observed that there is nothing in the provision limiting the exercise of this right to streets in existence at the time of the platting of the harbor. And if the right to so extend the streets continues for all time, it is at once apparent that the value of the tide lands to be sold and of the harbor area to be leased will be much impaired, if purchasers and lessees can be compelled at any time to vacate the same and lose valuable improvements without getting any recompense in case the city should see fit to lay out or extend streets over the same. Furthermore, there is nothing in the constitution or in the subsequent legislation thereunder making it at all obligatory upon cities to extend streets across tide lands, and it does not appear in this case that there is any desire to extend the street in question. On the contrary, at various times,

when the matter has been before the city council for action, a different intention has been expressed. Under the respondents' contention, if the city should never desire to assume the burden of laying out and maintaining Union street across the remaining part of the tide lands, the same would be useless to anybody, for the state could not convey a title thereto and the city would have no use for it. It is clear, it seems to us, that such was not the intention. Under the plat as laid out and thereafter corrected, every alternate street was extended across the tide lands to the harbor area and the others were terminated at Railroad avenue. The north half of said lot 7 lies between Railroad avenue and the harbor area. In making and correcting this plat it was doubtless understood to be for the best interests of the city not to extend all of its streets across the tide lands lying between Railroad avenue and the harbor area on account of the size of the blocks, and that it would better subserve the interests of commerce and the interests of its citizens and the public to extend only each alternate street beyond Railroad avenue. The city had the opportunity of extending Union street at that time, if it so desired, without cost, and not having seen fit to exercise the right, the state had power to dispose of that part of it which would have been within the street if extended, and the relator obtained a good title. As that is conceded to be the only ground upon which the application for a lease was denied, the writ should issue.

ANDERS, GORDON and DUNBAR, JJ., concur.

REAVIS, J. (dissenting).—I do not think the inconveniences of awaiting the prolongation of streets mentioned in the opinion will necessarily arise. In my judgment the protection of free ways to the harbor area for the public

June, 1898.]

Syllabus.

is more important than the mere private use of such portions of the tide lands as may fall within the prolongation of regular streets of municipalities across them. The constitution having made the grant of such easements without limitation of time in commencement of the user, I do not see very clearly the authority reposed in the court to assign such limitation.

[No. 2991. Decided June 13, 1898.]

THE STATE OF WASHINGTON, *on the Relation of Bellingham Bay Improvement Company, Appellant*, v. ROBERT BRIDGES, *as Commissioner of Public Lands of the State of Washington, Respondent*.

TIDE LANDS—CONTRACT FOR PURCHASE—EXTENSION OF TIME—CONSTRUCTION OF STATUTE.

Laws 1897, p. 229, §§ 27, 28 (Bal. Code, §§ 2157, 2158) authorizing the extension of all contracts issued by the state "to purchasers of school or other lands," upon payment of delinquent and accruing interest, applies to contracts for tide lands as well as to those for granted lands, since § 5 (Bal. Code, § 2134) of the same act declares that "public lands" and "state lands" shall be deemed synonymous, whenever used in the act, and that all sorts of granted lands, school lands, university lands, tide lands, shore lands and harbor areas are included in the term "public lands." (GORDON, J., dissents.)

Appeal from Superior Court, Thurston County.—Hon. BYRON MILLETT, Judge. Reversed.

Struve, Allen, Hughes & McMicken, and *Richard Winsor*, for appellant.

Thomas M. Vance, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is a petition by the appellant to prohibit and restrain the commissioner of public lands of the state of Washington from canceling upon the public records of his office a certain contract between the state of Washington and the appellant for the purchase of certain tide lands. The petition sets forth the entering by the appellant into a contract with the state for the purchase of certain tide lands and the partial payment made thereon, sets forth the statute of the state of Washington approved March 16, 1897, being chapter 89, Laws 1897, p. 229, the notification by the commissioner of the delinquency in the matter of payment and interest, the payment of the interest by the petitioner in accordance with the provisions of the law and the refusal of the commissioner to accept the same, and the fact that said commissioner is threatening to declare the contract terminated and to declare the lands therein described forfeited to the state. The contention of the respondent is that §§ 27 and 28 of the law above noticed do not apply to tide lands, but apply only to the granted lands of the state. Section 27 (Bal. Code, § 2157) is as follows:

“All contracts issued by the state of Washington to purchasers of school or other lands which are found to be delinquent in payment of interest two years from time of first payment, and which have not been extended by law, shall be declared forfeited by the commissioner of public lands unless such delinquent interest shall be paid to the state in accordance with notice hereinafter provided; that the commissioner of public lands shall notify the holder of such contract in each instance where payment of interest is overdue, and that unless payment is made within six months from the date of said notice, his contract will be canceled and the land shall revert to the state.”

Section 28 (Bal. Code, § 2158) is as follows:

“The time for making payment of principal on any of such contracts where one-tenth or more of the purchase price has been paid is hereby extended to January 1, 1905; *Provided*, That all delinquent interest due is paid as stated in section 27 of this act and all interest falling due on such contracts thereafter is paid annually on the dates stated in such contracts.”

It is also the contention of the appellant that the final provision of § 17 (Bal. Code, § 2147), which provides that

“The commissioner of public lands may, as he deems advisable, extend the time for payment of principal and interest on the contract heretofore issued and contracts to be issued under this act,”

applies especially to tide land contracts. The rule of *ejusdem generis* is invoked by the respondent and the insistence is that as to the words of § 27, *supra*, viz., “All contracts issued by the state of Washington to purchasers of school or other lands,” under such rule “other lands” necessarily means the same kind of lands as the kind expressed, viz., school lands, and that school lands being granted lands the provision “or other lands” must refer exclusively to other granted lands. Whatever construction, if any, can be placed on the last provision in § 17, an investigation of the whole act under consideration leads us to the conclusion that it was not the intention of the legislature to place the restriction contended for by the respondent upon the provisions of § 27. The plain provision is that the purchasers of school or other lands shall have the benefit of this law, and as throwing some light on the broader interpretation which we think was given to this language by the legislature, § 5 (Bal. Code, § 2134) provides that

“All lands described in section four [and section four describes school lands, university lands, all sorts of

granted lands, tide lands, shore lands and harbor areas] are 'public lands' and the terms 'public lands' and 'state lands' shall be defined and deemed to be synonymous whenever either is used in this act."

Hence we conclude that the words "other lands" might more reasonably be applied to the broader term "public lands" than to granted lands, they all being state lands. The evident intention of the legislature was the relief of purchasers of state lands and there would seem to be no good reason why the relief provided should be restricted to purchasers of only a portion of the state lands, and, in the absence of restrictive language on the part of the legislature, we must conclude that no such restrictions were intended. There can be no particular importance attached to the subdivisional heads in this bill, for the act itself is not consistent with such subdivisional heads in many instances. The first impression made by reading § 27, it seems to us, plainly would be that the words had reference to contracts in relation to all the public lands in the state. This seems to be as nearly in harmony with all the provisions of the act as would any other construction, and we do not think that the plain expressions of the legislature ought to be construed with reference to a technical rule of construction of whose existence the legislature was probably not aware, especially when its application would destroy another well settled and long established rule which is founded in equity and good conscience, viz., that forfeitures are not favored by the law, and that they will not be declared unless they are specifically and clearly provided for.

The judgment will be reversed with instructions to the lower court to grant the writ prayed for.

SCOTT, C. J., and ANDERS and REAVIS, JJ., concur.

GORDON, J., dissents.

June, 1898.]

Syllabus.

[No. 2861. Decided June 14, 1898.]

THE STATE OF WASHINGTON, *Respondent*, v. WALTER
H. ERVING, *Appellant*.

CRIMINAL LAW — STATUTE OF LIMITATIONS — COMMENCEMENT OF PROSECUTION — SECONDARY EVIDENCE — HOMICIDE — SUFFICIENCY OF EVIDENCE.

Under Code Proc., § 1188 (Bal. Code, § 6780) which provides that prosecutions for the offenses of murder and arson, where death ensues, may be commenced at any period after the commission of the offense; and for offenses the punishment of which may be imprisonment in the penitentiary, within three years after their commission, the term murder includes both degrees of that offense, and manslaughter, and for such crimes a prosecution may be instituted at any period after the commission of the offense, although the lower degrees of homicide may be punished only by imprisonment in the penitentiary.

A preliminary examination before a committing magistrate constitutes the commencement of a prosecution within the meaning of Code Proc., § 1188, fixing a limitation on the commencement of prosecutions.

When a letter is admissible in evidence, secondary evidence of its contents is admissible, when the witness testifies that he has no idea where the letter is and cannot produce it in court.

A verdict finding defendant guilty of murder in the second degree is warranted, when it appears from the evidence that deceased was found at the bottom of an abandoned well on an unoccupied farm on Whidby Island some three years after his disappearance, with marks on his skull indicating he had been struck there by a blunt instrument; that deceased was last seen alive in company with defendant, going in the direction of the premises where the body was afterward discovered; that defendant and deceased had become acquainted in the city of Seattle at a time when deceased had money on his person; that defendant induced deceased to go to Whidby Island, promising him employment; that defendant represented, upon being asked what had become of his friend (deceased), that the latter had returned to Seattle the day before; that there was but one boat a day from the island, and that deceased did not take the boat on the day indicated by defendant; that the island was sparsely

settled, the people well known to one another, and the movement of strangers always a matter of note; that defendant left the island and lived under an assumed name; and that when arrested he denied his real name and claimed he never knew such a man as the deceased.

Appeal from Superior Court, Island County.—Hon. J. G. McCLINTON, Judge. Affirmed.

Frederick R. Burch, and *Scott & Ellsworth*, for appellant.

Lester Still, Prosecuting Attorney (*Craven & Craven*, of counsel), for The State.

The opinion of the court was delivered by

GORDON, J.—The appellant was tried in the superior court of Island county on the charge of murder in the first degree, found guilty of murder in the second degree, and sentenced to imprisonment in the penitentiary for the period of twenty years. From the judgment of conviction he has appealed. The motion of the prosecuting attorney to dismiss the appeal and the further motion to strike the statement of facts are considered by the court to be without merit and they are therefore denied.

There are but three assignments of error to be considered in this case. The first is that the prosecution was not commenced within three years after the commission of the offense and is consequently barred by the statute of limitations. The information alleges that the offense was committed on or about the 11th day of July, 1894. Section 1188, 2 Hill's Code (Bal. Code, § 6780) is as follows:

“Prosecutions for the offenses of murder and arson, where death ensues, may be commenced at any period after the commission of the offense; for offenses the punishment of which may be imprisonment in the penitentiary, within three years after their commission; . . .”

June, 1898.] Opinion of the Court—GORDON, J.

We think that the term "murder" as used in the first part of this statute includes both degrees of that offense as well as manslaughter, and that a prosecution therefor may be instituted at any period after the commission of the offense. That part of the section which reads that "for offenses the punishment of which may be imprisonment in the penitentiary" the prosecution must be commenced within three years, is qualified by the other part, which provides that *murder* may be prosecuted at any time after the commission of the offense. To this extent the offense of murder is excepted from the general clause requiring all offenses the punishment for which is imprisonment in the penitentiary to be commenced within three years. The only case to which we have been cited that is directly in point is *People v. Haun*, 44 Cal. 96, in which it was held that as against the crime of murder, whether of the first or second degree, there is no limitation of time in which the prosecution must be commenced. But counsel is mistaken in the assumption that the prosecution of this case was not commenced *within three years* after the alleged commission of the crime, viz., July 11, 1894. From the record and the briefs of counsel it sufficiently appears that the defendant was arrested on the 22d day of June, 1897, and had a preliminary examination before a justice of the peace upon this very charge. That examination resulted in his being held for trial in the superior court, and was the commencement of the prosecution within the meaning of the statute. The argument that the prosecution was not commenced within three years rests upon a false assumption.

The next assignment is that the court committed error in permitting witness Garrison—a brother of the deceased—to testify on re-direct examination to the contents of a letter purporting to have been written by the deceased

from Seattle on July 3, 1894. The objection at the trial was that it was not the best evidence. The witness testified that he did not know where the letter was, that he could not produce it in court, that he had no idea where it could be found, and, as we think, laid the foundation for the introduction of the secondary evidence. There is another reason why the ruling cannot be disturbed. On cross-examination the appellant had asked the witness what was said by the deceased in that letter, and thus opened the door to the re-direct examination which followed.

The remaining question for consideration is, was the evidence sufficient to justify the verdict? The offense was alleged to have been committed on Whidby Island in July, 1894, near the village of Chicago. In the month of June and in the fore part of July, 1894, the deceased, Finley Garrison, was stopping in the city of Seattle seeking employment. It was fully established that the defendant was in his company at that place and roomed with him at the Queen City hotel for a couple of nights. While there, on July 8, 1894, deceased had a conversation with witness Bruce—with whom he was acquainted—and in the course of that conversation stated to the witness that he was going to Whidby Island to engage in work, driving a team in a logging camp. In the course of that conversation the defendant came up and was introduced by the deceased to the witness as "the man that he was going to work for." On July 3, 1894, the deceased wrote to his brother that he had hired out to drive a team for a period of six months. It was shown that in the early part of June the defendant had upwards of a hundred dollars in money on his person. On or about the 9th of July, 1894, the deceased went to Whidby Island for the first time. He was a stranger at that place, where the defendant was then residing in the family of his father. Several witnesses

June, 1898.] Opinion of the Court—GORDON, J.

who were acquainted with the defendant testified to having seen him July 9 and 10 in company with the deceased, who was a stranger to them, but whom they identified at the trial from the clothing and a photograph introduced. The last time that the deceased was seen alive was on or about the 11th day of July, 1894, and at that time he was in defendant's company, going in the direction of the Bradley farm. This latter place is located about two miles from the village of Chicago. It contained in the summer of 1894 about two acres of clearing which was surrounded by timber. About two hundred feet from the little house that stood in the clearing and at a point in the woods surrounded by dense underbrush is a well. The Bradley place had been unoccupied from January, 1894, until May, 1897. On the 4th day of the latter month, while engaged in cleaning out this abandoned well, the remains of a man were found at the bottom of the well. The well itself was about forty feet deep. The uncovered mouth or opening to the well was about eighteen by twenty-two inches. On the right side of the skull, just above the ear, was a fracture which in the opinion of the physicians who testified at the trial was caused by some blunt instrument, and which was considered by them as sufficient to have caused death. Prior to the spring of 1894 deceased had a bank account with the Bennett National Bank of Whatcom. In the clothing taken from the well was found a bank book of deposit containing the name of the deceased and various entries. There was also found in the clothing a bottle of ointment and several pieces of paper. These different articles, together with the clothing and the filling contained in the teeth, were fully identified. From the evidence in the case there can be no reasonable doubt but that the remains found in the well were those of Finley Garrison, and that his death

was caused by violence. Nor do we think the evidence less convincing as to the identity of the defendant. He was entirely familiar with the locality where the crime was committed and had worked in the near neighborhood of this well. The evidence tended very strongly to show that he had induced the deceased to accompany him to Whidby Island on the pretext that he would give him employment. This is shown both by the letter of the deceased written to his brother as late as July 3, and testimony of witnesses Bruce and Zent. On July 12th the defendant told witness Zent, who asked him "where his friend had gone" that the deceased had gone on the day before to Seattle to obtain supplies. It was shown by parties who were at the boat landing on that and the previous day when the boat went out that the deceased had not gone. It must be remembered that the village was small, that the country was sparsely settled, that few strangers visited that locality, that those living there were well known to each other, and the presence of a stranger in their midst was a subject of more or less comment. Communication with the outside world was through the medium of a steamer making daily trips to and from the village. Shortly after the disappearance of the deceased the appellant left his home on Whidby Island, and never returned until he was arrested upon the present charge. After leaving Whidby Island he assumed the name of Harry McNabb, and by that name was known thereafter until his arrest. To Mrs. Gitteau, for whom he worked from November, 1894, to February, 1895, he stated that his parents were living in New York City, whereas, as a matter of fact, they were at that time living on Whidby Island. The officer who arrested him testified that he stated to the defendant that he arrested him as *Walter Erving*, upon the charge of murdering *Finley Garrison*, that the defendant then insisted that *Erving* was not

June, 1898.]

Syllabus.

his name, that his name was McNabb, and that he did not know Finley Garrison and did not know of such a man. There were numerous circumstances shown at the trial which tended most strongly to establish the defendant's guilt and the verdict is sustained by the evidence. We have given the appellant's case careful consideration and are unable to discover any reversible error in the record of the proceedings. It follows that the judgment must be, and it is, affirmed.

SCOTT, C. J., and ANDERS, DUNBAR and REAVIS, JJ.,
concur.

[No. 2865. Decided June 14, 1898.]

D. S. JOHNSTON, *Appellant*, v. MARY E. WOOD, *Respondent*.

19	441
20	388

STATUTES — TITLE — CONDITIONAL SALES — BONA FIDE PURCHASERS.

The subject of an act providing for the recording of conditional sales and leases of personal property in order to prevent their being treated as absolute as to creditors and purchasers in good faith, is sufficiently expressed in the title of the act, entitled "an act in relation to conditional sales and leases of personal property."

Under Laws 1893, p. 253 (Bal. Code, § 4585), providing that all conditional sales of personal property, where the property is placed in the possession of the vendee, shall be absolute as to all creditors or purchasers in good faith, unless within ten days of the taking possession a memorandum of the sale stating its conditions be filed for record, a purchaser of such property in consideration of a pre-existing debt, is within the class of persons protected by the statute.

Appeal from Superior Court, Pierce County.—Hon.
THOMAS CARROLL, Judge. Affirmed.

Stiles & Harvey, for appellant.

Ira A. Town, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The appellant entered into a written contract with one W. W. Likens for the purchase of a piano, by the terms of which he was to pay \$20 in cash and \$10 monthly until the full purchase price was paid, the title and absolute ownership of the piano to remain vested in the appellant during that time. The contract further provided that upon default in the payment of the instalments the appellant should have the right to immediately reclaim the piano and take it into his possession. One payment was made on the piano and many months had elapsed since the others had become due. Said Likens had boarded with the respondent and at the time he left the state he owed her a large board bill. For the purpose of securing her board bill she purchased the piano from Likens for a stipulated sum without notice of the conditional sale above mentioned, the same not having been recorded at the time the purchase was made. When it was discovered that Likens had fled the state, this action of replevin was commenced against the respondent to recover the possession of the piano, and the same was taken from her possession by the sheriff. Respondent in her answer alleged that when this action was commenced she was the owner and in the possession of the piano, admitting its value as alleged by appellant; and further alleged the taking of the piano by the appellant and the sheriff of Pierce county, and that she was damaged thereby not only to the extent of the value of the property but also for its reasonable rental during the time the possession of it was withheld from her. Upon these issues the case was tried by a jury and a verdict rendered in favor of the respondent. Judgment was rendered upon the verdict in due time, and from such judgment this appeal is prosecuted. It may be conceded that the law has settled that

June, 1898.] Opinion of the Court — DUNBAR, J.

in the absence of statutory enactment the vendor in a personal contract for the sale of personal property, where by the express terms of the agreement the title is to remain in him until the article is fully paid for, has the full and absolute title thereto, not only as between the parties but as against every one else. But the legislature of this state in 1893, no doubt recognizing the fact that injustice was frequently done by the operation of this hidden lien, enacted the following (see p. 253, Laws 1893, Bal. Code, § 4585):

“That all conditional sales of personal property or leases thereof containing a conditional right to purchase where the property is placed in the possession of the vendee shall be absolute as to all creditors, or purchasers in good faith, unless within ten days of the taking of possession by the vendee a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county wherein, at the date of the vendee's taking possession of the property, the vendee resides.”

And § 2 (Bal. Code, § 4586) provides in detail for the recording of such instrument. The appellant maintains that this act is unconstitutional and void in that it contravenes art. 2, § 19, of the constitution of the state of Washington, which provides:

“No bill shall embrace more than one subject, and that shall be expressed in the title.”

It is insisted that the subject of this act is not expressed in its title, that the purpose of the act was to provide, and its subject matter provided, for the recording and the failure to record, and that the subject of the recording could not be contemplated from the title; that the title of the act should be sufficiently broad to express the entire scope of the legislation embodied in the act, and that if it falls short of this it is a violation of the constitutional provision and void. We do not think this act, or its title, is obnoxious

to the provision of the constitution quoted. It was said in *Montgomery v. State*, 88 Ala. 141 (7 South. 51), in discussing this question that

“ . . . it is permissible to insert those matters which, though they may not be specifically expressed in the title, are proper to the full accomplishment of the object which is expressed, or are naturally suggested by, or connected with, that object.”

It seems to us that the recording of the conditional sale might well be suggested from the title of the act, “An act in relation to conditional sales and leases of personal property.” The title is not restricted, but it is comprehensive and is sufficient to put any reasonable person upon inquiry. We scarcely see how the title to the bill could have been more explicit without incorporating the bill itself. The rule is well established, as laid down in *People v. Banks*, 67 N. Y. 568, that

“It is not allowable, for the purpose of invalidating a law, to sit in judgment upon its title, to determine with critical acumen whether it might not have been more explicit, and so drawn as more clearly and definitely to indicate the nature of the legislation covered by it. The legislature is not subject to judicial control in respect to the form or mode in which the ‘subject’ of a bill shall be ‘expressed.’ If it is expressed, the constitution is satisfied.”

If this act were to be held unconstitutional on the grounds alleged, it would be very difficult for the legislature to enact a law which would pass the scrutiny of the courts so far as the title is concerned.

The next contention of the appellant is that the respondent was not within the classes of persons protected by the statute, because she took the piano in payment of a board bill of \$200; that the words “purchasers in good faith” have been construed to be those who receive a transfer of property in consideration of something of value passing

June, 1898.] Opinion of the Court—DUNBAR, J.

between the parties at the time; in other words, that it must be a new consideration, and that a transfer for the purpose of securing the payment of a pre-existing indebtedness does not bring one within the statute. In this case we think that the evidence shows that the respondent did part with something, viz., her lien upon the property of Likens, which she released. But on the main proposition as to whether the words of the statute, "purchasers in good faith," apply to those who purchase in order to secure the payment of a pre-existing debt, the authorities are without doubt conflicting. But we see no good reason for the distinction which is made by some of the cases in this respect, and we think it was not the intention of the legislature to make any such distinction, and that the plain wording of the law is not susceptible of this construction. It was said by this court in *Willamette Casket Co. v. Cross, etc., Co.*, 12 Wash. 190 (40 Pac. 729), in construing this section of the mortgage law, viz.:

"A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchaser, and incumbrances of the property for value and in good faith, unless . . . it is . . . recorded in the same manner as is required by law in conveyance of real property" (Gen. Stat., § 1648; Bal. Code, § 4558),

that the construction contended for by appellant would be doing violence to the language used, the contention being that only such creditors were protected by the provisions of the law as before the time of the recording of the mortgage had acquired some specific lien upon the property. This court further said:

"The statute makes no distinction as to the creditors who are to be protected, and we see no good reason for holding that one class rather than another was intended. One is as much a creditor before his claim has been made a specific lien upon certain property as after, and for that reason

an unsecured creditor is as well described by the language of the section as one who had procured a specific lien as security for his claim. The intention of the legislature was to protect those who should give credit upon the faith of property owned by one to whom it was extended, and to give force to such intention the term 'creditors,' as used in the act, must be held to cover all classes of creditors."

And so we think here that the term "all creditors, or purchasers in good faith," applies without restriction to all purchasers who purchase without notice of the incumbrance, and who give credit upon the faith of property owned by one to whom the credit was extended. Outside of this case, the authorities being divided, as a matter of first impression we feel warranted in giving this construction to the statute.

We think these are the only real questions involved in this appeal. Some of the instructions complained of embrace the propositions which we have just discussed, and we think, so far as the instructions that were asked for by the appellant are concerned, the law which should have been given had already been given by the court, and that no error was committed in the trial of the cause in any respect. The judgment is affirmed.

SCOTT, C. J., and GORDON and REAVIS, JJ., concur.

ANDERS, J., not sitting.

June, 1898.] Opinion of the Court—ANDERS, J.

[No. 2897. Decided June 14, 1898.]

E. S. GRAHAM, *Appellant*, v. CITY OF SPOKANE *et al.*,
Respondents.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—HOW DETERMINED.

In computing the indebtedness of a city to ascertain whether it comes within the $1\frac{1}{2}$ per cent. limitation of taxable property, permitted by art. 8, § 6 of the constitution, there should be deducted from the outstanding indebtedness the amount of cash on hand and the amount of uncollected current and delinquent taxes.

Where a city has incurred a bonded indebtedness by a vote of its people, under the constitutional provision allowing cities by popular vote to incur such indebtedness in excess of $1\frac{1}{2}$ per cent. of its taxable property up to 5 per cent. thereof, such bonded indebtedness is not to be included in making computations of a city's indebtedness in order to ascertain whether it is in excess of the $1\frac{1}{2}$ per cent. limitation.

Appeal from Superior Court, Spokane County.—Hon. WM. E. RICHARDSON, Judge. Affirmed.

James Z. Moore, for appellant.

A. G. Avery, and *R. E. Moody*, for respondents.

The opinion of the court was delivered by

ANDERS, J.—It is conceded in this case that there are outstanding warrants of the city of Spokane, which were drawn at various times on the different funds of the city, aggregating, with interest, the sum of \$300,000, and that the city council, having determined to issue bonds for these outstanding warrants in the manner provided by law, duly passed an ordinance authorizing the sinking-fund commission of the city to enter into a contract with the firm of Morris & Whitehead, bankers, wherein and whereby the city was to agree to deliver the bonds to said Morris

19	447
21	209
19	447
26	234
19	447
30	628

& Whitehead in accordance with their bid and the terms of said ordinance. Subsequently to the approval of this ordinance by the mayor of the city, but before the contract authorized by the ordinance was executed, the plaintiff instituted this action to enjoin the sinking-fund commission from entering into the contract with Morris & Whitehead, and also to enjoin the city from issuing the bonds, upon the sole ground that the warrant indebtedness sought to be funded by the issuance of the bonds was in excess of the constitutional limit of the city's indebtedness, and therefore void. The defendants appeared and filed their answer, in which they denied all of the averments of the complaint which alleged that the indebtedness sought to be funded was void, or that it exceeded the constitutional limit, and set up, in substance, as affirmative defenses to plaintiff's complaint: (1) That the assets of the city, applicable to the payment of the warrants, consisting of cash on hand, the taxes assessed for city purposes during the year in which said warrants were issued, and the taxes due and unpaid for prior years, largely exceeded said warrant indebtedness, and that at no time when said warrants, or either of them, were issued, did the said indebtedness exceed the assets of the city; and (2) that the indebtedness mentioned and described in the complaint as existing bonded indebtedness was authorized to be incurred by the voters of the city at an election held for that purpose, at which election more than three-fifths of the voters voting thereat voted in favor of incurring said indebtedness, and that said electors authorized the issuance of bonds for the indebtedness so authorized, and that said bonds were not intended to include or constitute any part of the $1\frac{1}{2}$ per cent. of the taxable property of the city designated by § 6 of article 8 of the constitution as the limit of indebtedness. The plaintiff demurred to the affirmative matter set forth in the

June, 1898.] Opinion of the Court—ANDERS, J.

answer, which demurrer was by the court overruled. The plaintiff refused to plead further, and the court thereupon gave judgment for defendants and dismissed the complaint, and plaintiff appealed to this court.

The only question presented for our determination is whether or not the facts stated in respondents' answer constitute a defense to this action. That they do has been repeatedly held by this court, after careful consideration of the subject. In *State ex rel. Barton v. Hopkins*, 14 Wash. 59 (44 Pac. 134, 550), substantially every phase of this case was presented, and determined in accordance with the ruling of the court below in this cause. And in *Mullen v. Sackett*, 14 Wash. 100 (44 Pac. 136), which was an action to compel the auditor of Chehalis county to issue warrants upon the county treasurer in favor of the plaintiff for the amount of certain allowed claims against the county, this court said:

"In *State ex rel. Barton v. Hopkins*, ante, p. 59, it was held that the amount of indebtedness, within the meaning of the constitutional prohibition, was the total amount of indebtedness, less the amount of such unpaid taxes. It follows that the facts stated in the answer were not sufficient to justify the action of the auditor in refusing to issue the warrants if there were any taxes remaining uncollected on any of the assessment rolls of the county. If there were such taxes remaining unpaid, it was the duty of the auditor to have shown the amount thereof, and that after such amount had been deducted from the total indebtedness the balance exceeded the one and one-half per cent."

These cases were approved and followed in *Rands v. Clarke County*, 15 Wash. 697 (46 Pac. 1119) and *Kelley v. Pierce County*, 15 Wash. 697 (46 Pac. 253). As we have before intimated, this case falls squarely within the rule announced in the cases above mentioned, and notwith-

standing the able argument of counsel for the appellant, in which he attempts to show that the rule therein laid down by this court is unsound and should be discarded, we are not disposed to adopt a different one at this time, and thus overturn that which has hitherto been considered the settled law of this state. The judgment of the court below is affirmed.

GORDON and DUNBAR, JJ., concur.

REAVIS, J.—I think the case of *State v. Hopkins, supra*, is determinate of the controversy involved here; and the rule has become settled by adherence to that decision, and contracts have been made with reference to the rule so established. The reasoning and conclusions in the case of *State v. Hopkins* do not, however, as a principle of original constitutional construction, meet my approval.

[No. 2904. Decided June 14, 1898.]

WILLIAM NORFOR, *Appellant*, v. F. M. BUSBY *et ux.*,
Respondents.

APPEAL—HOW AFFIDAVITS INCLUDED IN RECORD—MORTGAGE FORECLOSURE—APPOINTMENT OF RECEIVER.

Affidavits introduced in the lower court will not be considered on appeal unless included in the statement of facts by certificate of the trial judge.

Under Laws 1869, p. 130, § 498, modifying the common law mortgage to a mere security, and giving the mortgagee the right of possession till foreclosure sale, the statute of 1854 (Laws 1854, p. 162) authorizing the appointment of receivers in actions for the foreclosure of mortgages must be construed as repealed by implication.

Appeal from Superior Court, Whitman County.—Hon. WILLIAM McDONALD, Judge. Affirmed.

19	450
120	579
19	450
630	230
19	450
630	312

June, 1898.] Opinion of the Court — REAVIS, J.

Winfree & McCroskey, for appellant.

Wyman & Neill, and *W. H. Harvey*, for respondents.

The opinion of the court was delivered by

REAVIS, J.—On the 7th of December, 1897, appellant commenced an action to foreclose a mortgage executed by respondent F. N. Busby, a single man, who afterwards intermarried with the respondent, Annie E. Busby, his wife. The debt due was \$13,810.44, not including costs and disbursements, and the mortgage security was upon farm lands in Whitman county. All of the other defendants named in the action, except respondents F. M. Busby and wife, defaulted, and respondents interposed a general demurrer to the complaint which was pending when an application for a receiver was heard. After the complaint was filed, appellant made his petition in the cause, praying for the appointment of a receiver to take possession of the mortgaged premises pending the foreclosure proceedings, and that the rents and profits accruing before sale be retained by the receiver as security for any deficiency on sale of the mortgaged premises to satisfy the debt.

The ground stated in the petition for the appointment of a receiver was that the mortgaged property was insufficient to discharge the debt. The petition stated facts which showed the insufficiency of the mortgaged property to satisfy the debt. A number of affidavits were also presented to the superior court in support of the allegations contained in the petition. An objection is made to their consideration here by respondents because they were not certified in the statement of facts to this court, and, while the consideration of such affidavits is not material in the decision here, the respondents' objection against their consideration must prevail, we having frequently determined that such papers are not part of the record unless made so by the certificate.

Respondents demurred to the petition for the appointment of a receiver and the demurrer was sustained by the superior court. The demurrer may be regarded as an objection to the appointment of the receiver upon the facts stated in the petition. The error assigned here is the refusal of the superior court to appoint a receiver on the showing made in the petition. Appellant maintains that § 326, 2 Hill's Code (Bal. Code, § 5456) is in force:

"A receiver may be appointed by the court in the following cases: . . . In an action by a mortgagee for the foreclosure of a mortgage and the sale of the mortgaged property . . . when such property is insufficient to discharge the debt, to secure the application of the rents and profits accruing, before a sale can be had."

And thus that a case was presented falling directly within the terms of the statute, and there is not presented in the controversy here any question upon the discretion of the court. This statute was enacted in 1854 (Laws 1854, p. 162), and is found in the Code of 1881, § 193. At that time there was no statutory declaration in Washington Territory changing the common law mortgage, and at common law, where the mortgage vested the fee in the mortgagee and he was entitled to the possession upon default in any of the terms of the mortgage deed, the statute was consistent with the nature of such mortgage. But the territorial legislature of 1869 (Session Laws, 1869, p. 130, § 498) provided that, "A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law," and since such enactment a mortgage executed in this state, whatever its terms, has been merely a security incident to, and for the payment of, the principal debt.

The statute is also expressive of the public policy of the

June, 1898.] Opinion of the Court — REAVIS, J.

state vesting the right of the possession in the mortgagor absolutely until a decree and sale. A similar statute has long existed in the state of Oregon (Gen. Laws of Oregon, 1845-64, p. 228, § 323). The force and effect of such legislation is fully discussed by the supreme court of the United States in the case of *Teal v. Walker*, 111 U. S. 242 (4 Sup. Ct. 420). The court said:

"This provision . . . gives effect to the view of the American courts of equity that a mortgage is a mere security for a debt, and establishes absolutely the rule that the mortgagee is not entitled to the rents and profits until he gets possession under a decree of foreclosure. For if a mortgage is not a conveyance, and the mortgagee is not entitled to possession, his claim to the rents is without support."

In that case a specific stipulation was written in the mortgage in which the mortgagee agreed to deliver possession of the mortgaged premises; and the court further said:

"The case of the defendant in error can not be aided by the stipulation in the defeasance of August 19, 1874, exacted by the mortgagee, that Goldsmith and Teal would, upon default in the payment of the note secured by the mortgage, deliver . . . possession of the mortgaged premises. That contract was contrary to the public policy of the state of Oregon, as expressed in the statute just cited, and was not binding on the mortgagor or his vendee, and, although not expressly prohibited by law, yet, like all contracts opposed to the public policy of the state, it cannot be enforced."

And the circuit court of appeals of the United States for this circuit has recently, in the case of *Couper v. Shirley*, 75 Fed. 168, decided that a stipulation in a mortgage that, upon the institution of foreclosure proceedings, a receiver of the rents and profits might be appointed on the application of the mortgagee, is contrary to the public policy of

Oregon, as shown by the statute heretofore mentioned. The legislature of Michigan, in 1843, modified the common law mortgage to a mere security, and under such statute the supreme court of Michigan, in *Wagar v. Stone*, 36 Mich. 364, held:

“The mortgagor being entitled under the statute to the possession and consequently to the rents and profits of the mortgaged premises until such time as his title is divested by a perfected foreclosure, it is not competent to cut short his rights in this regard by means of a receiver appointed in the foreclosure suit.”

The same court also held in *Hazeltine v. Granger*, 44 Mich. 503 (7 N. W. 74), that although the mortgagor so stipulates, a receiver cannot be appointed on a mere default to take the rents and profits of the mortgaged land. See, also, *McMillan v. Richards*, 9 Cal. 365 (70 Am. Dec. 655); *Guy v. Ide*, 6 Cal. 99 (65 Am. Dec. 490); *Union Mutual Ins. Co. v. Union Mills Plaster Co.*, 37 Fed. 286; *American Investment Co. v. Farrar*, 87 Iowa, 437 (54 N. W. 361); *Hardin v. Hardin*, 34 S. C. 77 (12 S. E. 936, 27 Am. St. Rep. 786).

Counsel for appellant have with great industry cited cases which seem to hold a contrary view to the conclusion enunciated by the above courts. In California particularly, some of the later cases would be confusing were it not found that the legislation making a mortgage merely security is followed by a later statute providing for the appointment of a receiver for the mortgaged premises when the security is inadequate. And it may be mentioned also that the statute enacted by the territorial legislature in 1854 does not exist in several of the states from which the authorities above quoted come. But we think the weight of authority and the best reasoning support the conclusion stated in 36 Michigan, in the case of *Wagar*

June, 1898.]

Syllabus.

v. Stone, supra. In so far as the statute of 1854, *supra*, is inconsistent with, or in conflict with, the later enactment of 1869 it is abrogated. When the mortgage is executed, the valuation of the security is made by the respective parties to the contract, and it is also executed in view of the public policy of the state expressed by the statute, and it is evident that the statute cannot be evaded by taking the most valuable incidents of possession from the mortgagor under the guise of rents and profits.

The judgment of the superior court is affirmed.

DUNBAR and GORDON, JJ., concur.

SCOTT, C. J.—I concur in the holding as to such lands as are here in controversy.

[No. 2910. Decided June 14, 1898.]

THE BOARD OF CHURCH ERECTION FUND OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, *Appellant*, v. THE FIRST PRESBYTERIAN CHURCH OF SEATTLE, *Defendant*, WALTER MORGAN, *Respondent*.

19	455
26	460
19	455
28	479

LIMITATIONS OF ACTIONS — PERSONAL PLEA — DEMURRER — RESTRAINT ON ALIENATION — PUBLIC POLICY — MORTGAGES — PAYABLE ON CONTINGENCY — WHAT CONSTITUTES ALIENATION.

The defense of the statute of limitations is a personal privilege, and can be pleaded only by the person directly entitled to the benefit of it; it cannot be set up by other defendants in the action.

A demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action will not permit the objection to be urged that the action is barred, as that question should be raised by demurrer on the ground that the action was not commenced within the time limited by law.

A covenant in a mortgage that in case the mortgaged premises should ever be alienated or abandoned for church purposes the mortgage debt should become due and payable is not void as being in restraint of alienation.

A covenant in a mortgage given by a Presbyterian church for money loaned from the erection fund of the General Assembly of that denomination, that the debt should become due if the church should cease to be connected with the General Assembly, is not a covenant contrary to public policy nor in restraint of religious belief.

A mortgage is not void because the debt is made payable upon the happening of a contingency and no time for payment is mentioned in the mortgage.

A covenant in a mortgage providing that in case the mortgaged premises be alienated or abandoned as a house of worship, except for the building or purchase of a better one, the mortgage should become due and subject to foreclosure, is broken by the mortgagor's allowing the property to be sold on execution and the church to be dispossessed of the premises by the issuance of a writ of assistance to the purchaser.

Appeal from Superior Court, King County.—Hon. WM. HICKMAN MOORE, Judge. Reversed.

James M. Gephart (*Strudwick & Peters*, of counsel), for appellant:

To constitute an alienation of the premises it was not necessary that the church corporation should make a voluntary conveyance. The law can alienate the property as effectually. The words of the mortgage are, "shall be alienated." *Tillinghast v. Bradford*, 5 R. I. 205. A foreclosure sale is an alienation. *Mount Vernon Mfg. Co. v. Fire Ins. Co.*, 10 Ohio St. 348; *Clement v. Shipley*, 2 N. D. 430 (51 N. W. 414); *Parker v. Dacres*, 2 Wash. T. 440. Confession of judgment and sale by the sheriff in pursuance of that judgment is an alienation. *Stansbury v. Patent Cloth Mfg. Co.*, 5 N. J. Law, 505. Alienation may be voluntary or involuntary; either is within the terms of the mortgage. 1 Freeman, Executions (2d ed.), §§ 189, 190;

June, 1898.] Opinion of the Court—DUNBAR, J.

2 Blackstone, Commentaries, pp. 348, 357; *Burbank v. Rockingham Mutual Fire Ins. Co.*, 24 N. H. 558 (57 Am. Dec. 300).

Allen & Allen, for respondent:

There can be no difference in principle between covenants in restraint of alienation contained in a mortgage and those contained in a conveyance of the fee. *DePeyster v. Michael*, 6 N. Y. 467 (57 Am. Dec. 470); *Bouldin v. Miller*, 28 S. W. 940; *Pritchard v. Bailey*, 18 S. E. 668; *Prey v. Stanley*, 42 Pac. 908.

The main ground upon which the demurrer was sustained by the court was that breach of the conditions of the mortgage had been shown. The only facts alleged as constituting a breach were that the sheriff had sold the property under an execution in favor of the respondent, and that at the sale the respondent had become the purchaser and the sale had been confirmed and the respondent put into possession of the property. A sheriff's sale is not an alienation. *Conover v. Mutual Ins. Co.*, 3 Denio, 254; *Masters v. Ins. Co.*, 11 Barb. 624; *Trumbull v. Ins. Co.*, 12 Ohio, 305; *Bouvier, Institutes*, 1992.

The opinion of the court was delivered by

DUNBAR, J.—This action was brought to foreclose a mortgage on certain lots in the city of Seattle. The complaint alleges that the plaintiff was a corporation organized and existing under the laws of the state of New York; that the defendant, the First Presbyterian Church, was a corporation organized and existing under the laws of the state of Washington; that the defendant, Walter Morgan, was doing business as Walter Morgan & Co.; that on May 12, 1893, the First Presbyterian Church of Seattle made and executed, by proper authority of law, its mortgage on the

said lots to the plaintiff to secure a loan of \$2,160, of a prior date; that the mortgage, in addition to the usual covenants, recited that in case the house of worship or the mortgaged premises should be alienated or abandoned as a house of worship by the party of the first part, except for the building or purchase of a better house of worship, then and in such case the defendant church should forthwith refund the money with interest thereon from the time of receiving it; that, upon the happening of either of such contingencies, said amount with interest should immediately become due and payable, with the other ordinary provisions with relation to the right of the mortgagee to sell the property; that the mortgage was duly recorded; that the First Presbyterian Church has failed to comply with the terms, conditions and agreements of said mortgage; that on the 28th day of May, 1897, the sheriff of King county sold said property under an execution to defendant Walter Morgan & Co., and said sale was confirmed by the court of King county, June , 1897, and by the said sale Walter Morgan & Co. claim to have an interest or title to the property; that on June 14, 1897, by reason of said sale, the First Presbyterian Church was dispossessed of said premises by a writ of assistance issued out of said court on petition of Walter Morgan & Co., and enforced by the sheriff of King county. The plaintiff asked judgment against the First Presbyterian Church for the sum of \$2,160, with interest thereon at the legal rate; for the foreclosure of the mortgage, and for a receiver to care for and conserve the interests of the property. The First Presbyterian Church made default. Defendant Walter Morgan filed a general demurrer to the complaint, upon the ground that the same did not state facts sufficient to constitute a cause of action, and upon hearing the court sustained the same. The plaintiff standing upon its complaint and refusing to plead further, a judg-

June, 1898.] Opinion of the Court—DUNBAR, J.

ment of dismissal was in due time entered. From this judgment an appeal is taken to this court. A motion is made to dismiss this appeal, but we think it is without merit.

It is contended by the respondent that the demurrer was properly sustained for the reason, (1) that it appeared from the complaint that the cause of action—the consideration of the mortgage—was barred by the statute of limitation; (2) that the mortgage was void because of its covenants being contrary to public policy and in restraint of alienation; (3) because the time when the debt was supposed to become due was vague, uncertain and indefinite; (4) because there had been no breach of the conditions and no right to foreclose appeared. There are many answers to the first contention, viz., that the debt, which had been contracted several years before the mortgage was given, was barred by the statute of limitation, but it is necessary to mention only two. In the first place, a pleading of the statute of limitations is a privilege which is accorded by the law to the defendant—in this case the Presbyterian Church—and it can avail itself of that privilege, or answer upon the merits, or default, just as it pleases. It is not a right which defendant Walter Morgan can receive the benefit of. Second, it was not pleaded in the court below. The demurrer interposed was upon the ground and for the reason that the complaint did not state facts sufficient to constitute a cause of action. This is the sixth cause of demurrer which is specified by the statute. The seventh is that the action has not been commenced within the time limited by law. This objection may be taken by demurrer when it appears upon the face of the complaint. Otherwise it may be made by answer. But it is not comprehended within the sixth clause which provides for a demurrer when the complaint does not state facts sufficient to constitute a cause of action, and the question cannot be raised under the sixth objection

any more than upon the other grounds for demurrer specified by the statute, viz., that the court has no jurisdiction of the person of the defendant or of the subject matter of the action, or that the plaintiff has no legal capacity to sue, or that there is another action pending between the same parties, or that there is a defect of parties plaintiff or defendant, or that several causes of action have been improperly united. When the attention of the court is intended to be directed to any of these specified grounds for demurrer it must be directed as specified by statute.

The next contention is that the covenants of the mortgage were contrary to public policy and also in restraint of alienation. We do not think there is any alienation in this mortgage at all. It is true that where an estate is conveyed in fee simple, a proviso that the grantee shall not convey, or shall not convey without the consent of the grantor, is held to be void as a restraint upon alienation, because it is repugnant to the estate which has been created by the debt for the benefit of the grantee. But no estate was created by this mortgage. The title to the land, both legal and equitable, remained in the mortgagor.

We have examined the cases cited by the respondent, upon which he so confidently relies, and we do not think they are in point at all. The principal case, and one in which the authorities are collated, is *DePeyster v. Michael*, 6 N. Y. 467 (57 Am. Dec. 470). In that case there was a lease of lands in fee, and in addition to the annual rent the lessor reserved to himself, his heirs and assigns, the right to purchase the premises, in case the lessee, his heirs, etc., should choose to sell, on paying three-quarters of the price demanded, the lessee covenanting to make the first offer to the lessor, his heirs, etc., on those terms, but in case the offer should be declined, then the lessor reserved to himself, his heirs, etc., one-fourth part of all moneys which should

June, 1898.] Opinion of the Court—DUNBAR, J.

arise from the selling, renting or disposing of the lands by the lessee, his heirs or assigns, when and as often as the same should be sold, rented or disposed of; with the condition that in case of a sale or other transfer, without the payment of such one-fourth to the lessor, his heirs or assigns, the sale or transfer should be void, and the premises should revert to the lessor, his heirs and assigns, who might then re-enter upon the premises and repossess and enjoy the same as of his former estate; and it was held that a reservation of the quarter sales and the condition and right of re-entry upon default of their payment were void. But the case and the arguments advanced and cases cited show conclusively that the doctrine contended for could not be applied to the conditions specified in this mortgage. The mortgagors are not prevented from selling this property. No restrictions are entailed upon it. But the effect of the stipulation or condition expressed simply is that if it is alienated or abandoned or not used for the purposes for which the money was loaned, the mortgage becomes due; and if a sale were made, it would simply be made subject to the mortgage.

It is also contended that the mortgage is contrary to public policy, for the further reason that it provided that the debt should become due if the church should cease to be connected with the General Assembly; that this is a restraint upon religious belief, and a court of equity should not uphold such contract. We do not see any merit in this contention. There is no restraint here upon any one's religious belief. The board of church erection has a right to invest its money for the promotion and benefit of the Presbyterian churches in the United States, if it sees fit so to do. Presumably low rates of interest and liberal time are given by this association for the purpose of promoting the interests of the church, and favorable conditions are obtained which could not be obtained from any one else; and

there is nothing wrong or intolerant or against public policy in sustaining conditions which would prevent their money from inuring to the benefit of secular business. If conditions like these cannot be enforced, then church edifices, which the society has been instrumental in building, might be used for dance houses, theatres, drinking saloons, and for other businesses which are not only foreign to the object of the promoters, but in direct opposition to their principles.

The third objection is that the mortgage was void because the time when the debt was to become due was vague, uncertain and indefinite. We think this is a provision of the mortgage which the mortgagor cannot take advantage of. 2 Jones, Mortgages, §§ 1183-84-85. Where the debt is made payable upon the happening of a contingency and no time for payment is mentioned in the mortgage, the mortgage is good. *Fetrow v. Merriwether*, 53 Ill. 275; *Belmont County Branch Bank v. Price*, 8 Ohio St. 299; 3 Pomeroy, Equity Jurisprudence, § 1188.

It is in the fourth place contended by the respondent that no breach of the conditions of the mortgage has been shown, and that consequently a foreclosure could not be had. A number of authorities are cited by both appellant and respondent, as to when the legal title passes and as to whether the legal title to land passes upon the sale or upon the confirmation of sale. It was said by this court in some of the cases cited, notably *Hays v. Merchants' Bank*, 10 Wash. 573 (39 Pac. 98), that the discussion of the title proposition was a discussion of a theory and did not affect the practical questions in that case; and so we think concerning that technical question here. This mortgage provides that in case the mortgaged premises be alienated or be abandoned as a house of worship by the party of the first part, except for the building or purchase of a better one, the mortgage

June, 1898.] Opinion of the Court — DUNBAR, J.

should become due, and that the mortgagee shall have power to foreclose the same. The complaint alleges that this property was sold under an execution issued out of the superior court to the defendant Walter Morgan, and that the sale was confirmed; that Walter Morgan & Co. have closed the door of the church; that the church has been dispossessed of said premises by a writ of assistance issued out of the court, and that the said Walter Morgan was thereby put in possession of the premises. It seems to us that within the spirit of the contract this was an alienation. The church had refused or failed to pay its legal obligations; the law in the enforcement of those obligations dispossessed it, and in legal contemplation and for the purpose of construing this mortgage and giving effect to the intention and purposes of the mortgagor, the possession which was given to Morgan must be held to be a possession given by act of the mortgagee. We think that plainly there was a breach of the covenants of the mortgage, and that the court erred in sustaining the demurrer to the complaint.

The judgment will be reversed.

SCOTT, C. J., and GORDON and REAVIS, JJ., concur.

ANDERS, J., not sitting.

[No. 2949. Decided June 14, 1898.]

THE STATE OF WASHINGTON, *Respondent*, v. ELMER
GIFFORD, *Appellant*.

RAPE—ACCESSORY BEFORE THE FACT—SUFFICIENCY OF INFORMATION
— RIGHTS OF ACCUSED.

One guilty as an accessory to the crime of rape by procuring its commission by another cannot be convicted under an information charging him as a principal with the commission of the crime by having carnal knowledge of the prosecutrix, as such an information would be in violation of his constitutional right (art. 1, § 22) to be informed of the nature and cause of the accusation against him.

The object of the statute (Code Proc., § 1189; Bal. Code, § 6782) abolishing the distinction between principals and accessories before the fact, so far as their trial and punishment are concerned, was to do away with the technical hindrances which before existed in relation to the trials of accessories, to provide for the indictment and trial of an accessory though the principal had been acquitted and to make an accessory before the fact the same as a principal, so far as the mode, manner, time of trial and extent of punishment are concerned.

Appeal from Superior Court, Spokane County.—Hon.
THOMAS H. BRENTS, Judge. Reversed.

Del Cary Smith, and *Fenton & O'Brien*, for appellant.

John A. Pierce, Prosecuting Attorney, for The State.

The opinion of the court was delivered by

DUNBAR, J.—An information was filed by the prosecuting attorney of Spokane county against the appellant, charging him with the crime of rape. Upon trial of the cause, the defendant was found guilty as charged in the information, and was sentenced to the penitentiary for life.

A motion was made to quash the information for the reason that the state was not entitled to prosecute the ap-

19	464
21	357
19	464
27	461
19	464
35	156

June, 1898.] Opinion of the Court—DUNBAR, J.

pellant herein by information. We have decided this question adversely to appellant's contention so often that we decline to enter into its investigation again.

A demurrer was also interposed to the information; appellant contending that it is not direct and certain as regards either the party charged, the crime charged, or the particular circumstances of the crime charged, and that the information did not inform the appellant of the nature and cause of the accusation against him. The material part of the information is as follows:

"Elmer Gifford is hereby charged with a public offense, to-wit, the crime of rape, committed as follows, to-wit: That on the 7th day of July, A. D. 1897, and within three years next before the filing of this information, at the county of Spokane and state of Washington, the said defendant, Elmer Gifford, then and there in the said county and state being, then and there unlawfully and feloniously did carnally know one Flossie Fuller, the said Flossie Fuller then and there being a female child under the age of eighteen years, and not the wife of the said Elmer Gifford—contrary to the statute," etc.

We hardly see how the information could have been more definite and certain in regard to the crime charged or the party charged, or the particular circumstances of the crime charged; and, that being true, we think the information informed the appellant of the nature and cause of the accusation against him, and that the demurrer was therefore properly overruled.

The testimony, however, showed that the appellant was an accessory before the fact to the crime of rape. Testimony was introduced to show that he acted as a procurer; that he sent men to the rooms of the prosecuting witness, and aided and abetted them in committing the crime charged upon her. Timely objections were made to the introduction of this testimony; the appellant contending

that he had no notice of the actual crime which was proven against him. But the court overruled the objections to the testimony, on the strength of a decision of this court (viz., *State v. Duncan*, 7 Wash. 336; 35 Pac. 117; 38 Am. St. Rep. 888), the testimony was admitted, and it was upon this character of testimony that the appellant was convicted. It was held by this court in *State v. Duncan*, *supra*—which was a larceny case—that, under the statute abrogating the distinction between an accessory before the fact and a principal, it was sufficient to charge the principal offense, and that testimony could be rightfully admitted, under such an indictment, showing that the defendant was an accessory before the fact. Upon more mature consideration, we think that case ought to be overruled; and, in any event, it seems that it would be an inconsistent rule to apply to the case at bar. The indictment in this case charges the offense of rape. Not only that, but it sets forth how the crime was committed, viz., by having carnal knowledge of Flossie Fuller. The constitution, in § 22 of article 1, which is the declaration of rights, provides that in criminal prosecutions the accused shall have a right to demand the nature and cause of the accusation against him. Surely, in this case, and under the direct language of this indictment, the appellant was not informed of the nature or cause of the accusation against him as it was developed at the trial. Our code provides that the act or omission charged as the crime must be clearly and distinctly set forth, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended. In other words, the law provides for a statement of facts. If the requirements of the law are that the indictment must be direct and certain as regards the particular circumstances of the crime charged, then it certainly must follow that the proof must correspond with the allegations of the indict-

June, 1898.]

Opinion of the Court — DUNBAR, J.

ment; for it cannot be said that the indictment in this case furnished the defendant with any notice that proof would be offered charging him with procuring others to commit the crime of rape upon this prosecuting witness, and it is not the policy of the law to compel persons charged with a crime to enter upon their defense without knowledge of the character of proof which they will be compelled to meet. This man was charged with committing the crime of rape upon this girl by having carnal knowledge of her. That was the act which presumably he would rely upon the state's proving, and a defense of this action would be what a man of ordinary understanding would think it his duty to make. Suppose that, when this information was served upon the appellant, he was innocent of the crime charged, and also innocent of being an accessory before the fact; the crime would feel assured that he could prove an alibi by proving that he was at that time in Seattle, or some other distant place. Certainly he would feel secure in resting upon such proof, and would have no notice whatever that he was to prepare for a defense for the crime of procuring. Again, showing how ridiculous the application of the rule contended for by the state would be to a case of this kind, suppose a woman should be charged with the crime of committing rape upon another woman, in the language and with the particularity with which the crime is charged in this information. The information would certainly be subject to a demurrer, for it would show on its face a physical impossibility. It is true that § 1189 of the Code of Procedure (Bal. Code, § 6782) provides that

“no distinction shall exist between an accessory before the fact and a principal, or between principals in the first and second degree, and all persons concerned in the commission of an offense, whether they directly counsel the act

constituting the offense, or counsel, aid and abet its commission, though not present, shall hereafter be indicted, tried and punished as principals.”

But we think that this provision of the law must be construed in connection with the provision of the constitution just above quoted, and the other provisions in relation to the qualifications of an indictment which we have before pointed out, and that the object of this statute was to do away with some of the technical hindrances which before existed in relation to the trials of accessories, and that it was the intention, under this statute, that the defendant might be indicted and tried even though the principal had been acquitted, and to make an accessory before the fact the same as a principal, so far as the punishment was concerned, and so far as the mode, manner, and time of trial were concerned. But we do not think it was the intention of the legislature, in the passage of this law, to set a trap for the feet of defendants. The defendant enters upon the trial with the presumption of innocence in his favor, and if he were called upon to blindly defend against a crime of which he had no notice, and which, we think, would be the result of the strict construction of this law contended for, the law itself would be unconstitutional; and any departure from the plain provision of the code, which provides, in substance, for a statement of facts in the indictment, endangers the liberty of the subject. The accused may be indicted, and must be, under the provisions of this law, as a principal, but the acts constituting the offense must be set forth. For instance, in this case the indictment should have charged the appellant with the crime of rape, “committed as follows: By procuring,” etc., instead of by alleging another and entirely different state of facts.

The conclusion which we have reached, viz., that there was a fatal variance between the allegations and the proof,

June, 1898.] Opinion of the Court—GORDON, J.

renders unnecessary a discussion of the other errors alleged. The judgment will be reversed.

SCOTT, C. J., and ANDERS, GORDON and REAVIS, JJ., concur.

[No. 2851. Decided June 16, 1898.]

THE BAY VIEW BREWING COMPANY, *Appellant*, v.
CHARLES TECKLENBERG *et al.*, *Respondents*.

ACTION ON PROMISSORY NOTE—FAILURE OF CONSIDERATION—INSTRUCTIONS—HARMLESS ERROR—ARGUMENT OF COUNSEL.

A partial failure of consideration is a defense *pro tanto* to an action upon a promissory note, when such failure can be definitely ascertained by computation.

In an action upon a promissory note to which the defense of total failure of consideration has been interposed, a charge to the jury that their verdict should be for defendants, if they find that the consideration agreed on was, in contemplation of the parties, greater than the amount of the note, but unless they so find their verdict should be for plaintiff, is not prejudicial to plaintiff, when it is clear from the verdict that the jury found there was a total failure of consideration.

Although the argument of counsel may be objectionable, it will not be presumed that the jury was misled thereby, when they were admonished by the court to disregard the irrelevant and immaterial statements of counsel.

Appeal from Superior Court, King County.—Hon. CHARLES H. AYER, Judge. Affirmed.

Allen & Allen, for appellant.

Gill, Keene & Shaw, for respondents.

The opinion of the court was delivered by

GORDON, J.—The complaint sets up two causes of action. The first upon a promissory note for the sum of \$1,600,

executed by defendants in favor of Hemrich & Co., and thereafter indorsed to the plaintiff, and the second upon a promissory note for \$200 executed by Nick Michaely & Co. and Hemrich & Co., to the Puget Sound National Bank and thereafter indorsed to the plaintiff. The defendant Michaely was not served with summons, nor did he appear in the action, the defendant Tecklenberg being the only defendant served with process. As to the first note, his answer set up, and the evidence shows, that at the time of the execution of the note the defendants had purchased from Hemrich & Co. a stock of liquors and certain saloon fixtures situated in the city of Seattle, and also a leasehold interest in said saloon premises for the term of three years at the monthly rental of \$225; that the consideration therefor was \$3,300, \$1,700 of which was paid in cash and the balance of the purchase price was represented by the note; that the stock and fixtures were not at any time worth, or considered to be worth, a sum exceeding the sum of \$1,500; that the leasehold was worth the sum of \$300 per month; that after making said cash payment and executing the note said Hemrich & Co. wholly failed and refused to procure for the defendants a lease to the premises, by reason whereof the consideration for the note wholly failed; and that all of the facts were known to the plaintiff herein prior to its receipt of the note. As to the second cause of action the answer alleged that the \$200 note was "executed by the defendant Michaely alone, for his own personal use and benefit, with the full knowledge of said Hemrich & Co., and of the plaintiff herein, and not in the interest of the said partnership or said partnership business." When the evidence was all in the court permitted the plaintiff to amend the second cause of action by alleging that plaintiffs are successors in interest of Hemrich & Co., who were sureties on the note, that they paid the note after ma-

June, 1898.] Opinion of the Court—GORDON, J.

turity and had it assigned to themselves as such sureties. By direction of the court a verdict was returned in favor of plaintiff upon the second cause of action, and, the jury having found against plaintiff as to the first cause of action, it has appealed from the judgment, and the defendant has also appealed from the judgment entered against him upon the second cause of action. Numerous errors are assigned in the respective briefs. For the most part they relate to rulings by the trial court upon the introduction of the evidence. The position most strongly urged by the plaintiff is that neither the answer nor the evidence given in its support constitutes any defense to the \$1,600 note. In support of this position it is urged that there was at most but a partial failure of consideration, which constituted no defense, but at most gave grounds for a cross-action. Authority, but at most gave grounds for a cross-action. In volume 4 Am. & Eng. Enc. Law (2d ed., p. 195), it is said:

“Though some of the earlier cases denied the doctrine, there is now no question, in the light of recent decisions, that a partial failure of consideration is a defense *pro tanto* when such failure is liquidated in amount, or can be definitely ascertained by computation.”

And the numerous authorities cited in support of the text fully sustain it. In the present case the evidence is very clear as to what the contract was, that the defendants were to receive the lease for a term of three years at a stipulated rental of \$225 per month, and that the premises were worth \$300 per month. It was therefore a mere matter of computation for the jury to determine to what extent the consideration had failed. It was a matter susceptible of definite ascertainment by the jury. The charge of the court was certainly as favorable as the plaintiff was entitled to. It was as follows:

“If you find that at the time of the giving of this note that it was given as a part consideration for a bill of sale or

a transfer of this stock and fixtures, and that it was a part of the contract that a lease of this store was to be procured for the term of three years, at a fixed rate of \$225 per month, if that lease was to be procured and signed or procured directly for the benefit of these defendants, as a part of the transaction; and if you further find that *the value of that lease, in contemplation of the parties at that time, was greater than the amount of this note*; then you may find for the defendant upon that cause of action. *But unless you do so find, you will find for the plaintiff upon that cause of action.*"

Presuming that the jury accepted and were governed by the rule of law which the court by this instruction gave them, it is clear from the verdict that they found that there was a total failure of consideration for the note, and the fact that the court erred in telling them that unless the value of the lease in contemplation of the parties was *greater* than the amount of the note they should find for the plaintiff could have in nowise prejudiced the plaintiff. While the argument of defendants' counsel to the jury was somewhat objectionable, we are unable to see how it could possibly have influenced the jury, and the court having duly admonished them to disregard the irrelevant and immaterial statements of counsel, it must be presumed that they were in no manner misled by the argument. Other errors assigned are not regarded as of sufficient importance to warrant discussion. We think the cross-appeal by defendants is wholly without merit, and that the court rightfully directed a verdict in plaintiff's favor as to the second cause of action.

The judgment will be in all things affirmed.

SCOTT, C. J., and DUNBAR and REAVIS, JJ., concur.

ANDERS, J., not sitting.

[No. 2893. Decided June 16, 1898.]

19	478
30	90

C. A. CARLSON, *Respondent*, v. WILKESON COAL AND
COKE COMPANY, *Appellant*.

NEGLECTANCE OF MASTER—EMPLOYMENT OF INCOMPETENT SERVANT.

The negligence of a coal company in employing an incompetent door tender, by reason of which injuries were sustained by a fellow servant, is established by evidence showing that the door tender was a boy fourteen and a half years old; that his duty consisted, for thirteen hours a day, in opening a door in a dark mine gangway for approaching trains; that there was a heavy pressure of air against the door, which was increased whenever a train approached, rendering it difficult to open; that the boy had been employed but a short time, had once before failed to get the door open, had been complained against and his removal promised several days before the injuries occurred; that at the time of the accident he did not notice the approach of the train, though signalled by whistle, quickly enough to open the door; and that the engine crashed through the door, causing the injuries complained of to the plaintiff.

Appeal from Superior Court, Pierce County.—Hon. THOMAS CARROLL, Judge. Affirmed.

Sharpstein & Blattner, for appellant.

Fred H. Peterson (*E. D. Wilcox*, of counsel), for respondent.

The opinion of the court was delivered by

REAVIS, J.—Appellant is the owner of a coal mine at Wilkeson, Pierce county. The entrance to the mine is through a gangway or tunnel. A three-foot gauge car track is laid in the gangway. Over this track engines and cars carry the coal out of the mine. At the entrance to the gangway and at the distance of 450 feet further toward the interior are constructed doors. The inside door is six feet and one-half inch at the top, six feet five and three-

fourth inches at the bottom and five feet seven inches in height, and is one and a half inches thick, braced by two cross bars on the inside. On the outside of the door strap hinges running out the width of the door were fastened by bolts running through the door and the braces. Both doors were hung to the timbers at the right side of the gangway and opened towards the entrance of the gangway. The usual speed in the gangway was between six and eight miles an hour; sometimes faster. These doors were opened by an employee stationed at the right side of the gangway, and to open the door he had to cross the track. Two locomotives were operated in the gangway and an engineer and switchman or brakeman were employed on each of the engines. Respondent was a switchman on one of the engines. Frank Cope, a boy aged fourteen and a half years, was stationed at the right of the interior door. His duty was to open the door when the engine came along the gangway, and to shut it after it passed through. Respondent was with his engine and as it, with cars attached, was going along the gangway at a speed of from seven to twelve miles an hour, the doors being unopened at the usual signal, the engine crashed through them and respondent was injured, having his leg broken. In his complaint he alleges negligence of appellant in the employment of an incompetent person to attend the opening of the doors. The gangway was a dark passage and the attendant at the doors could only stop trains by waving his lantern. At the conclusion of the trial appellant moved the court to take the case from the consideration of the jury and enter judgment dismissing the action on the ground that there was no evidence that plaintiff's injury was sustained as the result of any negligence on the part of the defendant, and that plaintiff's injury resulted from his own negligence. The motion was overruled. The jury returned a verdict for \$750 damages in favor of respondent.

The only error assigned and argued here is the insuffi-

ciency of the evidence to justify the verdict. It appears from the plaintiff's testimony that the doors across the interior of the gangway had to be opened against a pressure of forty-five pounds, together with the additional weight caused by reason of the advancing engine; that appellant employed a boy named Cope, fourteen and a half years of age, to open these doors; that a few days before Cope had attempted to open these doors and failed; that the boy said he could not get the door open at that time and that complaint was made to the authorized representative of the appellant company of the incompetency of the boy at this time, and that such representative promised to remove him and appoint a competent man, but several days were allowed to elapse without such removal and the injury occurred to the respondent while the boy was still attending the door, and because the boy did not open it when the engine came along. Appellant maintains that the statute permits the employment of boys over fourteen years of age in mines, and that there is a presumption of his capacity, and the burden of proof is upon the respondent to show his incapacity. It was, however, correct for the jury to take into consideration, in connection with the other facts, the immature years of the boy, and also the fact that he was engaged for thirteen hours a day at the door. The boy's size, age, previous experience, strength and intelligence could properly be considered by the jury. The place was an important one. The lives of the company's employees depended upon the competency and faithfulness with which the work was done. It required care in the selection of a competent person to attend these doors. One of the witnesses for plaintiff testified that when the air was strong it required all a man's strength to open the door. Before the engine crashed through the door the whistle was blown two or three times. Cope testified he did not hear the whistle. He should have heard it. Appellant offered testimony tending to show that

boys of the age of Cope were frequently employed for the same character of work he was doing in other coal mines. It would not be determinative of competency, but certainly ordinary experience and observation would imply that a boy fourteen years and a half old was not ordinarily equal in strength or intelligence to a full grown man. But the nature of the work is to be considered. As to the force of proof by appellant of the custom of employing boys for the same work in other coal mines, the supreme court of the United States, in *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454 (2 Sup. Ct. 938), well observed:

“ And to say, as a matter of law, that a railroad corporation discharged its obligation to an employee—in respect of the fitness of co-employees whose negligence has caused him to be injured—by exercising, not that degree of care which ought to have been observed, but only such as like corporations are accustomed to observe, would go far towards relieving them of all responsibility whatever for negligence in the selection and retention of incompetent servants.”

There is substantial testimony to support the verdict of the jury. No exceptions were taken to the instructions of the court, and its judgment is affirmed.

SCOTT, C. J., and DUNBAR and GORDON, JJ., concur.

ANDERS, J., not sitting.

June, 1898.]

Syllabus.

[No. 2929. Decided June 16, 1898.]

THE STATE OF WASHINGTON, *on the Relation of H. A. Porter, Appellant, v. T. E. HEADLEE, as County Auditor, Respondent.*

19 477
27 699

COUNTY COMMISSIONERS — ALLOWANCE OF CLAIMS — CONCLUSIVENESS —
RES JUDICATA — AUTHORITY OF COUNTY ATTORNEY TO REPRESENT
COUNTY — EVIDENCE.

Bills of justices of the peace for salary should be presented to the county commissioners for allowance, and the action of the board in passing thereon is conclusive, in the absence of fraud or mistake.

An order of the county commissioners rescinding the former action of the board, when done at a special meeting and without any notice of the transaction of such business, is illegal and void.

In a mandamus proceeding to compel a county auditor to draw a warrant for the salary of a justice of the peace, the defendant cannot raise the defense that the city in which the justice had jurisdiction had a population less than 5,000 and that the justice had waived his right to salary through failure to pay into the county treasury the fees collected by him, when such questions have already been decided adversely to the county in an injunctional suit brought by the county attorney in his own name, but in the interest of the county, which authorized the proceedings and paid the costs of the action, for the purpose of determining the liability of the county on account of the claim at bar and others of similar nature.

In such an action, in order to establish that the county attorney represented the county in the injunction suit, evidence is admissible showing that when the question of allowing plaintiff's claim was before the county commissioners one of the board said to the county attorney that the matter was entirely in his hands and that as a member of the board he would do whatever the attorney advised in the matter, which was tacitly assented to by the other members.

Evidence is likewise admissible, in such a case, showing that during the entire trial of the injunction suit two members of the board of county commissioners were present and that the county attorney conferred with them several times during the progress of the trial.

Appeal from Superior Court, Snohomish County.—Hon. FRANK T. REID, Judge. Reversed.

T. E. Clohecy, and *Cooley & Horan*, for appellant.

J. H. Naylor, *T. J. Humes*, and *F. M. Headlee*, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is an application for a writ of mandamus, brought by the relator in the name of the state against the defendant as county auditor of Snohomish county, to compel the defendant as such county auditor to draw and deliver to relator a warrant issued upon the salary fund of such county in the sum of \$1,932.95. A demurrer was interposed to this petition, which was sustained by the court and judgment of dismissal was entered. From this judgment an appeal was taken to this court, and the case was decided and reported in 18 Wash. 220 (51 Pac. 369). The judgment of the lower court was reversed in that case, and the petition was held good on its face. The court in concluding its opinion in that case said:

“Of course, if there was any collusion or fraud in the obtaining of the judgment, which is so severely criticised by the respondent, that is a matter that could be set up in an answer to the petition.”

Upon the return of the case to the lower court, an answer was filed by the auditor, the case was tried and the judgment was against the relator and ordered a dismissal of the action.

It seems to us that, under the answer in this case, the former decision was almost, if not entirely, conclusive of this appeal. It was decided in the case when it was here before, following the decision in *State ex rel. Banks v. Board of County Com'rs of Snohomish County*, 18 Wash. 160 (51 Pac. 368), that bills of justices of the peace of this

June, 1898.] Opinion of the Court—DUNBAR, J.

character, should be presented to the county commissioners for allowance. It has been decided in *State ex rel. Sheehan v. Headlee*, 17 Wash. 637 (50 Pac. 493), that the action of the board in passing upon a claim of this kind was of a quasi judicial nature, and that their allowance or rejection of such claims, in the absence of fraud or mistake, was conclusive. The same principle was substantially decided in *Dillon v. Whatcom County*, 12 Wash. 391 (41 Pac. 174), and as we are satisfied with the law as laid down in those cases we will not enter again into a discussion of those propositions.

There are two propositions, either of which, it seems to us, is conclusive of this case in favor of the appellant. It appears from the petition and from the testimony in the case—in fact is not controverted anywhere—that the bill which is the subject of the controversy here was presented to the board of county commissioners and allowed by them. Some objection is made by the respondent to the effect that it does not appear by the records kept by the auditor that this bill was presented to the auditor, but the testimony in this case shows (and we think it was properly allowed) that the bill duly itemized and verified was presented to the board during a regular session, and that the auditor was present at the time acting as clerk of the board. The presentation of the bill to the board must necessarily be the important and essential proceeding which gives jurisdiction, and not the filing of the same with the auditor. When it was presented to the board it was the duty of the auditor to preserve and file it and he, and not the person who presented it, is responsible for its preservation. The answer, however, shows that the allowance of this bill was afterwards reconsidered by the board of county commissioners. The history of the case is as follows:

The bill was allowed on January 8, 1897, just prior to the retirement of the old board of county commissioners.

On February 9th the new board of county commissioners reconsidered the action of the old board in allowing the bill and refused to allow the same. Passing the question of the right of the new board to sit in review of the action of the retiring board, it appears without any contradiction and plainly from the record that the act of rescission was done at a special meeting and without any notice of the transaction of such business. Such being the case, the act of the commissioners in reviewing the former action of the board was unquestionably illegal and void, and the allowance of the bill by the commissioners being valid, under the former rulings of this court, the auditor had nothing to do but to issue the warrant.

Again, it appears that during the pendency of an application for a writ of mandamus upon the 19th of January, a formal demand was made upon the auditor for the issuance of his warrant and also for the issuance of a warrant for relator's December salary, an order for which had been made and entered by the old board on January 8th. Upon the refusal of the auditor to issue either of said warrants, relator sued out an alternative writ of mandamus against the auditor to compel the issuance of the December warrant. After the action of the board in February, the auditor answered, setting up two affirmative defenses. The first was that he had made a careful examination of all the evidence presented to the board in support of the claim, and that from such examination he, the auditor, did not think the relator entitled to such warrant. The second was that, since the allowance of the claim, the commissioners had made an order revoking the same. A demurrer was interposed to this answer by the relator. While the cause was thus pending, the prosecuting attorney, J. H. Naylor, entered into a stipulation with the relator and his attorney to the effect that, if the demurrer in the mandamus proceeding should be sustained, the prosecuting attorney would bring an injunction-

June, 1898.] Opinion of the Court — DUNBAR, J.

al suit in which the issues to be tried should be, (1) did Everett on November 4, 1894, have a population of over 5,000 inhabitants; and (2) had claimants waived their rights to salary by reason of having failed to do any acts enjoined upon salaried officers. The court afterward sustained the demurrer to the answer, correctly stating the law in his opinion in the following words:

“It is the opinion of the court that the auditor has no authority under the law to question or resist orders made by the commissioners court in matters within their jurisdiction, except where fraud, accident or mistake can be clearly proven. There being no allegation in defendant’s answer setting up any of these things he has no right to resist the order made by the commissioners court on January 8, 1897, referred to and admitted in his answer. And it appearing by said answer that the order of said commissioners court made and entered on the . . . day of February, 1897, purporting to rescind and vacate the former order allowing plaintiff’s claim for salary, was made at a subsequent and different term of said court, can furnish him no defense to the former order or writ of mandate sought herein, the attempted revocation being without jurisdiction and void.”

Thereupon, under the stipulation, this case was allowed to lie dormant awaiting the action of the prosecuting attorney relative to the bringing of the injunctive suit. Such suit was immediately commenced by the prosecuting attorney in his own name, as such officer, and the board of county commissioners and Headlee as county auditor, York as county treasurer, and this relator, together with three other claimants were named as defendants. The prosecuting attorney, however, did not cause the complaint to be served on any of the defendants except the claimants. Trial was thereupon had and the court decided the issues in favor of the relator, one of the findings of fact being that the city of Everett in said county and state did, upon the 3d day of November, 1894, and up to and including the 11th day

of January, 1897, have a population of more than 5,000 inhabitants; that the defendants were ignorant of that fact, and for that reason failed to pay into the county treasury of said county the fees claimed by them as justices and constables at the end of each month, as required by law, and for that reason failed to file a receipt therefor with the county auditor showing such monthly payments to said treasurer. It was found that the defendants had made and filed their claims for balance due them, and that the commissioners duly allowed and adjusted said claims after deducting the amount collected by and chargeable to them as fees for services rendered by them as such individuals. And as conclusion of law found that the defendants had not waived their right to collect the salary due them as officers by reason of their failure to pay into the county treasury the fees collected by or chargeable to them, and to file with the county auditor of said county receipts for such payment from said treasurer. Thereupon a judgment of dismissal was entered. No appeal was taken from this judgment, and upon the trial of the cause at bar below the judgment and proceedings of the cause just referred to were offered in evidence.

It must be conceded that, if the county was a party to the injunctional proceeding, it is bound by the judgment in that action, but it is the contention of the respondent that this was an action brought by Naylor as an individual, and that the county was not a party to the same and cannot therefore be bound by the decree; and such was the view taken by the lower court. It was held in the former trial of this case that, so far as the petition showed, while the suit was in the name of Naylor as prosecuting attorney, the county was the real party plaintiff. This of course was denied by the answer, but we do not think the denial was sustained by the testimony. Circumstances sometimes speak more convincingly than direct allegations or denials by

June, 1898.] Opinion of the Court—DUNBAR, J.

parties interested. In the first place, the presumption must be that the suit was instituted for some purpose, and that the prosecuting attorney at least thought that the action was for the benefit of the county of which he was the legal adviser. The complaint is entitled J. H. Naylor, county attorney, plaintiff, against the board of county commissioners, the auditor, treasurer and the claimants, as defendants. The first allegation of the complaint is that he is the duly elected, qualified and acting county attorney of said county of Snohomish, state of Washington. The proceedings of the county board in relation to these claims are set forth at length, and an allegation, or rather historical recital, is made that the plaintiff, on or about the 9th day of February, 1897, appeared before the board of county commissioners and requested them to make and enter the order reconsidering the order made January 8th, allowing claims for salaries, and that said order was then revoked; recited the mandamus proceedings which were pending in the court to compel the auditor to pay the claims; recited the stipulation which was made between the attorneys for the claimants and the prosecuting attorney as attorney for the county auditor; recited the fact which shows that he was appearing in the interest of the county, viz., that he was compelled to bring the action to make all of the above defendants parties thereof for the purpose of avoiding a great multiplicity of suits. In the affidavit the prosecuting attorney swears that he is the duly elected, qualified and acting county attorney of Snohomish county, Washington, and plaintiff herein. It is impossible to presume that Mr. Naylor was setting forth the fact in all these different instances that he was prosecuting attorney simply as words descriptive of him, and that for such descriptive purposes he thought it was necessary to even make an affidavit that he was the duly elected, qualified and acting prosecuting attorney of Snohomish county. So that from the record

it appears very plainly that Mr. Naylor at least thought that he was acting for and in the interest of the county. This might not be sufficient, however, to bind the county. But it appears from the testimony in the case that it was the general understanding not only by the auditor but by the commissioners that the matter was in the hands of the prosecuting attorney for settlement. Mr. Clohecy testified as follows in relation to the presentation of these claims:

“I first went to the auditor and asked for the warrants not expecting any difficulty, but my answer was that it was in the hands of the prosecuting attorney. I then went to the board of county commisisoners. I asked what was the trouble about these warrants not being issued and they answered that it was in the hands of the prosecuting attorney. So then I went to the prosecuting attorney.

Q. Were all the members of the board present at that time?

A. I think so. I know Mr. Joergensen and Whiting were sitting behind the table.

Q. Was there any dissent by any member of the board to that statement?

A. No.

Q. Now, Mr. Clohecy, you heard the testimony of the auditor with reference to the later order made by the board relative to these claims?

A. I did.

Q. Were you present before the board on any occasion prior to the date upon which the record shows this order to have been made relative to this order?

A. Yes, sir.

Q. Who appeared there and advocated the adoption of that order?

A. Mr. Naylor, the prosecuting attorney.

Q. This is the resolution rescinding or attempting to rescind the former action?

A. The rescinding resolution, yes.

Q. On how many different occasions did yourself and

June, 1898.] Opinion of the Court — DUNBAR, J.

Mr. Naylor appear before the board of county commissioners on that matter?

A. Two afternoons of two or three hours long."

The relator also offered to prove (and we think under the circumstances the testimony should have been admitted as having some weight on the question of whether or not the prosecuting attorney was authorized to act in this matter for the county), that at the time when the argument was finally completed upon the matter of revoking the order allowing the claims, Mr. Whiting, a member of the board, during the session said to Mr. Naylor that the matter of these claims was entirely in his hands and he, as a member of the board, felt that he would do as Mr. Naylor told him to do in the matter, and that this statement was tacitly assented to by the other members of the board. They also offered to prove, which proof was competent, that the deputy county attorney appeared in the case on behalf of the plaintiffs, and that during the entire trial of said cause two of the members of the board of county commissioners were present, and that on several occasions during the progress of the trial the prosecuting attorney conferred with them; and it also appears from the record in this case that the costs of that suit were presented to the board of county commisisoners and that they allowed the same without any dissent and ordered them paid by the issuance of a warrant on the general fund. And it is impossible, in view of the whole record, to escape the conclusion that the action was brought not only in the interest of the county but at the instance and request of the county commissioners; that they ratified the bringing of the action without protest, paid the costs of such action, and that they were the real parties in interest. That being true, the judgment of the court was a complete bar to the defense in this action, no fraud having been alleged in the answer.

The judgment of the court will be reversed and the cause remanded with instructions to grant the permanent writ of mandamus as prayed for.

SCOTT, C. J., and GORDON, ANDERS and REAVIS, JJ., concur.

[No. 2996. Decided June 16, 1898.]

C. W. YOUNG, *State Treasurer*, v. BYRON MILLETT,
Judge of the Superior Court of Thurston County.

STATE TREASURER—ADDITIONAL DUTIES—COMPENSATION.

The state treasurer is not entitled to compensation in addition to his salary for services in disposing of the securities deposited with him by a foreign insurance company as trustee for the policy holders, when the act imposing that duty on him makes no provision for additional compensation.

Original Application for Mandamus.

Thomas M. Vance, for petitioner.

Haight & Owings, for respondent.

Daniel Gaby, as *amicus curiae*.

The opinion of the court was delivered by

REAVIS, J.—The state treasurer is the relator and the respondent is judge of the superior court of Thurston county. The petition states that, under the law of the state, insurance companies foreign to this jurisdiction are required to deposit with the state treasurer collateral securities in the sum of \$50,000 for the protection of policy holders of the state, and that the relator had in his possession, on the 17th day of January, 1897, certain collateral securities deposited with him by the State Insurance Com-

June, 1898.] Opinion of the Court — REAVIS, J.

pany of Salem, Oregon, for the protection of its policy holders; that the insurance company was at that time insolvent and had been declared so by a court of competent jurisdiction of the state of Oregon; that an action was brought on the 17th of January, 1897, in the name of Lovina K. Hartsuck in her own behalf and on behalf of others similarly interested, against the relator and the insurance company, to require the relator to convert the securities in his hands into cash and to apply the proceeds to the satisfaction of the claims of the Washington policy holders against said insolvent insurance company; that, in pursuance to the order of the superior court, the relator converted the securities into cash in the manner prescribed by the court; that on the 16th of March, 1898, he made his report to the superior court, embodying a statement of all claims examined by him as trustee, and allowed or disallowed, showing the total aggregate of claims and the total amount of cash receipts from the sales of securities. Exceptions were allowed to the report and were heard and determined by the superior court; that relator in the report requested the superior court to determine what was a reasonable compensation for his services in acting as trustee and converting the securities into cash, examining and auditing the claims presented and disbursing the cash so collected pro rata among the various claimants as allowed by final order of the court; that upon exception to this part of the report the court refused to examine the question of what would be a reasonable compensation for relator's services and refused to make any allowance out of the fund in relator's hands of any sum whatever for relator's services; that the court refused to make the examination and allowance for the reason that in its opinion the services were required by law of the relator in his official capacity as state treasurer. The relief demanded by relator

is that the superior court be directed to examine and determine the reasonable value of the services of relator as trustee and to make a proper allowance out of the fund for relator's services in the execution of the trust.

The cause involves the right of the state treasurer to compensation in a proceeding by a policy holder of an insolvent insurance company of another state, under Laws 1897, p. 53. A trust was created by § 11 of the insurance law of 1890 (Laws 1889-90, p. 345), which is re-enacted as § 15 of the insurance act of 1895 (Laws 1895, p. 157 Bal. Code, § 2819), which declares that the state treasurer shall receive certain securities from foreign insurance companies and hold them in trust for the policy holders. Section 17 of the act of 1895 (Bal. Code, § 2821) directs when the securities may be delivered to the insurance company. This trust having been imposed by law upon the treasurer it became his duty to administer the same in the interest of the policy holders. The act approved March 6, 1897 (Laws 1897, p. 53), provides a convenient forum where the policy holder may institute an action for the administration of the trust and dispose of the securities and assets of a foreign insurance corporation for the benefit of the beneficiaries of the trust, and that the trust shall be administered and the securities and assets distributed by the state treasurer under the direction of the court. The duties of the trust had been imposed upon the treasurer by the legislation of 1890 and 1895, *supra*. The act of 1897 merely specifies the method of its administration. Section 19, art. 3 of the constitution declares that the state treasurer shall perform such duties as shall be prescribed by law, and for compensation shall receive an annual salary which may be increased by the legislature but shall never exceed \$4,000 per annum. Section 25 of art. 2 of the constitution declares: "Nor shall the com-

June, 1898.] Opinion of the Court—REAVIS, J.

pensation of any public officer be increased or diminished during his term of office." Chapter 4, title 3, Bal. Code (1 Hill's Code, title 3, ch. 4) is entitled "Of the State Treasurer." Section 156 of the chapter declares, referring to the treasurer's bond, that one of the conditions is that he shall faithfully perform all of the duties required of him by law. Section 165 of the chapter declares that "the state treasurer shall perform such other duties as may be required of him by the constitution and laws of the state," and § 163 states the salary. The law of 1897 has imposed the duty upon the treasurer to administer the trust and the legislature has not authorized compensation for such services. It is a rule that the legislature has power to impose additional duties upon an officer without providing additional compensation. *Mudgett v. Liebes*, 14 Wash. 482 (45 Pac. 19). A public officer in the rendition of the services is not entitled to compensation unless it is prescribed by statute. *Throop, Public Officers*, § 446, and authorities cited; *School District v. Cole*, 4 Wash. 395 (30 Pac. 448). Additional duties imposed by law do not entitle an officer to additional compensation, nor do extraordinary risks. *Throop, Public Officers*, § 479.

It is true two distinct public offices may be held by the same person where the duties are not inconsistent. There does not seem to be any inconsistency between the duties imposed by the legislation relating to insurance companies and the other duties of the state treasurer imposed by law. If this be true, he must discharge those duties, and those required in relation to insurance are merely additional duties and as such additional duties he is required by the constitution and statutes to perform them. No compensation has been provided for such additional services and it would seem that if they are merely additional services of the treasurer, compensation for them might

fall within the inhibition against increasing the salary of a public officer. *Yates v. National Home*, 103 U. S. 674; *Mullett's Adm'x v. United States*, 150 U. S. 566 (14 Sup. Ct. 190).

The writ is denied.

SCOTT, C. J., and DUNBAR and GORDON, JJ., concur.

[No. 2947. Decided June 17, 1898.]

R. C. BISHOP, *Respondent*, v. G. W. AVERILL *et ux.*,
Appellants.

AMENDMENT OF PLEADINGS—DISCRETION OF COURT.

An application by defendants to amend their answer so as to question the individual liability of one of them, made at the commencement of a second trial after the cause had been once tried and appealed on the same pleadings, is a matter peculiarly within the discretion of the superior court, and its action will not be disturbed in the absence of a showing of abuse of such discretion.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Stoll, Stephens, Bunn & Macdonald, for appellants.

Danson & Huneke, for respondent.

The opinion of the court was delivered by

REAVIS, J.—This is the second appeal in this cause. The first was heard and determined and is reported in 17 Wash. 209 (49 Pac. 237), and the exhaustive discussion, with the full statement of facts there found renders it unnecessary to re-state the case here. There was, further, an opinion on a petition for rehearing, 17 Wash. 222 (50 Pac. 1024). The cause is now here again and the appellants complain

June, 1898.] Opinion of the Court — REAVIS, J.

that the superior court erred in overruling appellant's objection to the introduction of any evidence against the appellant Flora A. Averill, and in overruling her motion subsequently made to direct a verdict in her favor, and that the court erred in denying appellant's application to amend their answer. Several errors are assigned upon the ruling of the superior court upon the admission of evidence in the case, but in the view here taken of the controversy the introduction of, or objection to, such testimony was immaterial. The cause had been tried in the superior court upon the same pleadings and heard upon appeal in this court. The liability of Flora A. Averill seems to have been questioned by appellants only at the commencement of the last trial, and appellants then requested to file an amended answer, which was resisted by the respondent. At this stage in the history of the cause it was a matter peculiarly within the discretion of the superior court whether an amended answer could be filed and such discretion evidently was not abused. In view of the complete review of the essential features of this cause in the former opinion of the court, we do not think that it would be of any value to again discuss many of the questions or much of the argument made by appellants.

The judgment of the superior court is affirmed.

SCOTT, C. J., and DUNBAR, ANDERS and GORDON, JJ.,
concur.

[No. 2942. Decided June 18, 1898.]

SAMUEL H. VER PLANCK, *Respondent*, v. CHARLES LEE *et al.*, *Defendants*, A. P. MCCLAIN *et ux.*, *Appellants*.

MORTGAGE — ASSUMPTION BY AGENT — RATIFICATION.

Although a deed of mortgaged premises containing an assumption of the mortgage debt may have been taken by an agent of the grantees without their knowledge or consent, the action of the agent must be regarded as subsequently ratified, when it appears that the grantees afterwards made payments of interest on the debt and conveyed the premises by warranty deed, covenanting that they were the owners in fee simple.

Appeal from Superior Court, King County.—Hon. WILLIAM HICKMAN MOORE, Judge. *Affirmed*.

Sharpstein & Blattner, for appellants.

H. H. Blackburn, for respondent.

PER CURIAM.—The question presented by the appeal in this case is whether the appellants are liable to a personal judgment for the amount of a debt secured by a mortgage upon land conveyed to them by the mortgagor, and is entirely one of fact. It is contended that the deed to the appellants which assumed the mortgage was taken by an agent without their knowledge and authority. So far as the time the deed was taken is concerned this may be conceded, and still we are of the opinion that the judgment should be affirmed. It clearly appears that the appellants knew thereafter that they were the owners of the real estate for they subsequently conveyed the same by their warranty deed covenanting that they were the owners in fee simple; it appears by the proofs, especially by a letter of McClaine, the husband, that the appellants

June, 1898.]

Syllabus.

assumed and agreed to pay the mortgage debt. Whether they knew of the assumption clause in the deed at the time it was executed or not, they knew it afterwards and made certain payments of interest thereon and ratified it beyond all question.

Affirmed.

[No. 2939. Decided June 18, 1898.]

MANHATTAN TRUST COMPANY, OF NEW YORK, *Appellant*, v. SEATTLE COAL AND IRON COMPANY, *Defendant*, MURPHY, GRANT & Co. *et al.*, *Respondents*.

19	493
120	18

CORPORATIONS — CAPITALIZATION — FRAUD — MORTGAGES — SALE AS ENTIRETY — CONCLUSIVENESS OF DECREE — PARTIES — PRIORITY OF CLAIMS — RECEIVERS.

The capitalization of a coal mining company at \$5,000,000 is not shown to be fraudulent by the fact that the property of such corporation consisted of coal lands purchased by the promoters of the corporation for a sum less than \$100,000, where the grantors did not know the full value of the land and some sold for less than they believed it worth for the purpose of developing that section of the country, and estimates obtained by the promoters showed that there were more than 10,000,000 tons of coal in the land, which could be put on the market at a profit or from one to two dollars per ton.

The fact that the holder of a mortgage covering both real and personal property undertakes to enforce the claim under the mortgage, though the mortgage on the personalty is invalid, is not sufficient to establish fraud on the part of the mortgagee.

A mortgage executed by a company while it was solvent is not fraudulent as to general creditors, where there was no fraud in the original incorporation of the company, and the stock was all issued as fully paid up, the mortgage duly recorded, and the debts of such general creditors incurred long afterwards.

A judgment giving priority to the claims of certain general creditors of a corporation over the holders of bonds secured by a trust deed executed by such corporation, rendered in an action to foreclose such deed brought by the trustee therein, is conclusive on all the bond-holders, where the trust deed provided that such trustee should be trustee for all the bond-holders and have the exclusive right to bring suit on the request of a majority, and that no bond-holder should be entitled to sue without having first requested the trustee to sue.

The general creditors of a corporation cannot complain that a decree in an action to foreclose a trust deed executed by the corporation, in which all the creditors were made parties, provided for the sale as an entirety of all the property of the corporation, including personalty not covered by the trust deed, where no request for a separate sale of the personalty was made, and no appeal taken on that point by the party objecting.

General creditors of a corporation whose claims have been adjudged prior to the claims of holders of bonds secured by a trust deed do not relinquish their priority as against the bond-holders by inviting certain other creditors to come in and participate on paying them a percentage, where there was no intention to relinquish their priority and their claims would have been paid in full, even if such other creditors had been allowed to participate.

A proceeding for the appointment of a receiver for a coal and iron company, which operated a short railroad line in connection with its mines, should not be treated as a railroad receivership so as to give precedence to claims for supplies furnished in the conduct of the business a few months prior to the receiver's appointment, as the essential element of a railroad receivership—the maintenance of the operation of the road for the benefit of the public—is lacking.

Appeal from Superior Court, King County.—Hon. WILLIAM HICKMAN MOORE, Judge. Reversed.

Struve, Allen, Hughes & McMicken, Condon & Wright, and S. H. Piles, for appellant.

Bausman, Kelleher & Emory, Strudwick & Peters, Donworth & Howe, Preston, Carr & Gilman, and Burke, Shepard & McGilvra, for respondents.

The opinion of the court was delivered by

SCOTT, C. J.—This is the same plaintiff that was before this court in the case reported in 16 Wash. 499 (48 Pac. 333, 737), and the relator in the application for a writ of prohibition reported in 17 Wash. 380 (49 Pac. 507), and the appeals herein relate to the same proceedings.

While said former appeal, which was taken by certain creditors from an order dismissing their petitions, was pending in this court the plaintiff, on December 29, 1896, procured a decree of foreclosure of its mortgage in the lower court. An order of sale was issued thereon and the property struck off to the plaintiff, but, before a confirmation was had, the remittitur was sent down from this court and the lower court rendered another decree on June 4, 1897, setting aside the sale and its judgment of dismissal as against the appealing creditors, and modified the foreclosure decree by establishing a priority in their favor as against the bonded indebtedness, and also made provision to the end that other creditors might be enabled to show a preference right. For convenient reference the creditors, aside from the bondholders, were classified substantially as follows:

Class "A"—The five original petitioners who had appealed to this court. 16 Wash. 499, *supra*.

Class "B"—Those other creditors who had presented claims to the receiver pursuant to his published notice under the court's order, which were reported by him as allowed subject to the superior lien of the plaintiff's mortgage, but who did not appeal and who were referred to in the decree of June 4th.

Class "C"—The Manhattan Trust Company in its own right and J. D. Smith & Company, who did not present their claims to the receiver until May, 1897, after the time

fixed by the order aforesaid, but were in prior to the decree of June 4th.

Class "D"—The Seventh National Bank of America, The Bank of America, Alexander M. White and J. F. Alexander, who did not present their claims until after the order and decree of June 4. In its last decree of February 23, 1898, the court provided that all the creditors in Class "B" and some of those in the remaining classes should take precedence over the bonded indebtedness and established certain preferences among the various creditors as against each other, some being admitted to share *pro rata* with class "A."

The principal appeal was taken by the plaintiff contending in part that the decree of foreclosure rendered on December 29, 1896, was final as to all creditors except those in Class "A" who had previously appealed and that by it the bonded indebtedness under the mortgage was given preference as to all except the five creditors in Class "A" aforesaid, and contending further, in case the mortgage should be set aside, that all of the bondholders are entitled to come in as general creditors, and share equally in the distribution of the funds. Appeals are presented, also, by some of the general creditors, which for convenience have been designated as cross-appeals, and raise questions as to the preferences decreed. In rendering the last decree the lower court was of the opinion that the matters had been determined on the former appeal but admitted all the proofs of the respective parties to the end that the controversies might be finally disposed of, and it is here practically for a trial *de novo*. In consequence of the voluminous record and the numerous conflicting claims presented, the case is a most complicated one, but it will not be necessary to set forth all of the contentions in detail, owing to the conclusion we have reached with reference to the mortgage.

A much stronger showing has been presented by the plaintiff than was made at the time the other appeal was heard, and it may be well at first to consider the matter as if this were the first hearing in this court, although it will not be necessary to give as full a statement as it would have been were it not for the previous hearing, the facts largely appearing in the former opinion, certain of which will be referred to later. But briefly, the Seattle Coal and Iron Company was organized as a corporation under the laws of the territory of Washington about the first of February, 1887, for the purpose of purchasing, improving, developing and mining coal lands and selling the same, with a capital stock of \$2,000,000, which was afterwards, by supplemental articles filed September 8, 1887, increased to \$5,000,000. The entire capital stock, in shares of \$100 each, was subscribed September 30, 1887, and was shortly thereafter issued in regular form as fully paid stock. In carrying out its corporate objects the corporation acquired about 1,340 acres of coal land, near Gilman, in King county, in the month of October, 1887, and developed and operated the same on an extensive scale continuously from the time of purchase until the appointment of a receiver, February 27, 1894. The land was purchased of various parties for something less than \$100,000 in the aggregate, and it is contended by the appealing creditors that it did not exceed that amount in value, and one ground of fraud urged on the former hearing, to which considerable weight was attached by the court, was that the capitalization was fictitious and fraudulent.

The plaintiff contends that under the decision of this court in *Kroenert v. Johnston*, ante, p. 96 (52 Pac. 605), the company had a right to place its own valuation upon its property, and that under the statute, § 4280, Bal. Code (1 Hill's Code, § 1588) the entire capital stock might be

represented by the mining property. There may be some question as to whether a coal mining company is within the terms of this statute, or whether it was not intended to apply only to corporations organized for mining precious metals, where the undertaking is more hazardous and speculative, the chances of success less and the possibilities greater. There the statute provides in substance that the entire capital stock may be represented by the property or mining claims and that there need be no subscription. The constitutionality of the subscription provision of the statute, under article 12, with reference to corporations other than municipal, was not in question there, it not being a mining company, nor here, for in this case there was a subscription to the stock. Also this company was organized before the constitution was adopted and the matter is only incidentally referred to. But there might not be much real difference in any event except, perhaps, as to the valuation of the property, under the rule which is too firmly established in this state to be called into question now, and in fact is not questioned, that property may be taken in payment of shares of stock of corporations generally. As to this question, and the rights and liabilities flowing therefrom in fixing the valuation, the authorities have been considered by this court to some extent in the case cited, and in *Turner v. Bailey*, 12 Wash. 634 (42 Pac. 115), there referred to, and it is not necessary to consider them further.

This land, when purchased, was in an undeveloped state; and testimony was introduced with reference to its estimated or prospective value in substance as follows: One Gilman testified that

“I was the original promoter [of the Seattle, Lake Shore & Eastern Railway]. My attention was first called to Seattle by a description being sent to me of this particular coal field, and I went there from New York for the express

June, 1898.] Opinion of the Court—SCOTT, C. J.

purpose of looking into this coal field. After I had, in company with a skilled coal mining engineer, examined the property, I came to the conclusion that it would require about twelve to fourteen hundred acres to control the field and make a successful operation, and I therefore, from that time, about 1883, set about negotiating options on about that number of acres owned by various parties. Nothing had been done toward the development of these lands except the sinking of a few pits. In connection with that I had to consider the question of transportation to tide water; in a direct line, 25 miles; by the only practical route, 40 miles. I then organized the Seattle, Lake Shore & Eastern Railroad Company, and secured terminals at tide water at Seattle, had partial surveys of the route made, and came to New York for the purpose of raising the money necessary to build this 40 miles connecting the coal field with tide water at Seattle. I was successful in that by reason of the valuable terminals at tide water that I had an option on and the control by option of this coal field, which by reason of the state of the coal trade there would show an enormous profit in the operation of such a railroad. . . .

At the time I secured the options I knew pretty well what the extent of the coal field was. The owners did not. Before, the property was in several ownerships, and the individual owners were never able to develop it, nor could they do anything toward the construction of the railroad to tide water. In my opinion, uniting all of the properties into one ownership and the building of the railroad enhanced the value of the properties.

I was one of the parties organizing the Seattle Coal and Iron Company, and had a share in fixing the capitalization of that company. It was based on what I conceived to be the earning capacity of the property after the railroad was constructed to it. I had studied the history of the coal business on the Pacific coast two or three years prior to that time, and ascertained the various sources of supply, foreign and domestic, the number of tons that came from Puget Sound, the cost of mining and transportation, and that investigation showed that the profits prior to that

time on coal had not been less than \$1 per ton, and was generally from \$1.50 to \$2 per ton. That was net. I ascertained to my satisfaction (the quantity of coal) and I think I so stated in the railroad company's prospectus that we could mine 1,000 tons per day from that property, and would not exhaust it in 100 years, and I think I further stated that our minimum output for our first year would be 1,000 tons and possibly 1,500 to 2,000 tons per day. Our capitalization was based upon our belief in these facts, that is, that the minimum profit would be \$1 per ton net, and if we mined 1,000 tons per day for 300 days would be 300,000 tons per year, giving us a revenue of \$1,000 per day, which would yield, not only 5 per cent. on the bond issue of \$1,000,000, but 5 per cent. on the \$5,000,000 of the capitalization, and that there was a large amount of bonds in the treasury to be used for development of the mine, building the bunkers, and as I expected at that time to put on a fleet of four-masted schooners to carry coal to San Francisco; and there would be a revenue of fifty to one hundred thousand dollars from those sources, which would really make this stock a 6 per cent. stock. The Seattle Coal and Iron Company issued \$5,000,000 of stock, but \$2,000,000 was covered into the treasury to be used as treasury stock, so that its outstanding capital was \$3,000,000, the same as that of the Seattle Coal and Transportation Company, in which the title of the New Castle mines was, and which is owned by the Oregon Improvement Company. That property is nothing like as valuable as the Seattle Coal and Iron Company in my judgment."

Mr. Gilman says he assigned the options to Jones, who paid cash for the lands and turned them into the company with the capitalization, and that the promoters placed a certain amount of stock with Jones and the syndicate that took bonds as an additional consideration for the bond purchase. There was testimony by at least one other witness to the same effect as to the values of the property, and as an expert having a special knowledge of the subject.

June, 1898.] Opinion of the Court—Scott, C. J.

It was also controverted to some extent by witnesses showing the prices paid and their estimate of the value of the land purchased. One of the grantors testified, however, that an important consideration in inducing him to sell, in addition to the price paid, was the opening up and developing of that section of the country, as he had other real estate in that vicinity.

According to these estimates by the promoters, more than ten million tons of coal existed in these lands above water level. The cost of mining and transporting the same could be fairly well estimated. The scope of the demand and net value of the product in the market were measurably known. It does not appear that the vendors knew of the existence of the coal, or could procure the means to develop the mines if they did know it. No accurate money valuation could well be placed upon these lands, under the circumstances. As the plaintiff argues, to say that the ascertainment of the quantity and quality of the coal, the consolidation and ownership of the land, the securing of money for the development and the prosecution of the enterprise, did not largely enhance the valuation of the property in the estimate of those acquiring it, would be unwarranted. There is no showing now that the quantity or quality of the coal was not as estimated, or that the estimate was insincere. In fact, it fairly appears that the failure of the enterprise was due to the financial and business conditions existing for some time, but commencing several years thereafter. No inference of bad faith should be drawn from the fact that the projectors could not forecast this.

It has been urged that the fact that some two million dollars of the stock was turned back into the corporation, to be disposed of to assist in raising funds for the prosecution of the enterprise, and was sold, with the bonds,

for considerably less than its par value, goes to show that the projectors knew that the estimate was extravagant and fraudulent; but we do not think this in anywise tends to establish fraud, as against these creditors. It was necessary to raise money for the development of the enterprise, and no doubt can exist that it was then thought it would be profitable, to a large extent, on that basis. It is also urged that there was proof to show that the corporation was the real purchaser in the first instance, and that payment for the land originally was in some instances, at least, made by the corporation. But this, if true, could lend no additional significance on the question of fraud, as against the parties now complaining, in connection with the other facts shown.

The plaintiff also produced upon the trial, so far as it was able, the stock books, transfer books and corporate records of the Seattle Coal and Iron Company, and proved that it did not have or control certain records of said company.

Without going more fully into the testimony it is sufficient to say that it establishes, in the opinion of the majority of the court, entire good faith on the part of the promoters and the corporation in the matter of the capitalization, and we are compelled to find at this time, regardless of whether we were right or wrong before, that there was no fraud shown, even though it was conceded that the value of the land was exaggerated in the capitalization of the company. If there was any fraud contemplated, what was it? One would naturally look for some system or scheme to defraud, if fraud was intended at its inception. The fact of an exaggerated value might have an important bearing under certain conditions; for instance, if the bondholders were here complaining that they had been deceived by an excessive valuation placed

June, 1898.] Opinion of the Court—Scott, C. J.

upon the property and had been led thereby into buying the bonds on the belief that they were amply secured, then the question would be brought directly in issue, for there was an intention to float the bonds of the company and many of them were disposed of to various parties, not all of them stockholders. But it is sufficient to say that no bondholder is complaining of any fraud. The claims of the general creditors were for supplies sold to the company and for money loaned to it, all of which were used in the conduct of its business. At most, there is no showing or contention that any of the proceeds were fraudulently issued to the stockholders, in dividends or otherwise, and it appears without controversy that for a long time the company prosecuted its business successfully. These debts were all incurred some years after the formation of the company, the execution and recording of the mortgage and the issuance of the bonds.

It is no longer a question as to whether the former decision of this court was right or not, but only as to how far it is binding and conclusive. The suit was brought originally to foreclose the mortgage and it was not an insolvency proceeding, although the general creditors were invited or notified to present their claims. It, however, has become substantially an insolvency proceeding, the parties all being before the court, although the receiver did not represent the general creditors, at least originally. But the case presented is very different from one where a mortgage is given by a corporation after its insolvency, with reference to the distribution of its funds among its creditors.

The decree rendered in the lower court pending the appeal did not establish the validity of the mortgage as against the other creditors, because it was not final, under our previous holdings. See opinion on rehearing, 16

Wash. 522 and on application for writ of prohibition, 17 Wash. 383. By these opinions the proceeding was not finally adjudicated, but was left in a condition for creditors other than those in class "A" to contest the validity of the mortgage bonds, and they were given an opportunity of making a showing entitling them to precedence thereover if they could do so. But it left an issue to be tried as to them, and each creditor's claim could only rest upon its own basis, as facts might possibly exist which would make the mortgage void as to some and valid as to others, it not having been given while the corporation was insolvent, as stated, and therefore not void as to the creditors generally. No such facts, however, with reference to any of them have been shown. None of them are entitled to come in under the former decree with the five appealing ones and have it treated as conclusive as to settling their rights, for they did not appeal; and this court expressly stated in the opinion that it only determined the issues with reference to the pleadings and the parties then before the court. The plaintiff's case now stands upon a different and much stronger footing with regard to them, as stated, no fraud being shown in the original incorporation and the subsequent increase of its capital. There was no subscription liability, the stock having been issued as fully paid up, nor is there any attempt to enforce any such liability. Neither was any fraud shown in conducting the business, but the same was evidently carried on in good faith in pursuance of the objects for which the company was formed. The mortgage was duly recorded, and the debts to them were incurred long afterwards. Of course, if there had been a subscription for the shares of stock, which was only partially paid, there would have been a contract liability against the subscribers, which the creditors could enforce; but inquiry would have

shown that the stock was issued as fully paid up, and that the property of the company was subject to this mortgage to secure its bonds, aggregating a large amount. Neither do we find that there was any fraud in the bringing and conduct of the suit to foreclose the mortgage. These and all other creditors were notified to come in and present their claims. Many of them did so without much delay and, if they were not satisfied with the way the suit was being conducted, and the management of the property by the receiver, they had the right to apply to the court for an immediate sale, or for such relief as they considered themselves entitled to. The proceeding was an open one in the courts of the state in the locality where many of the creditors were doing business, and there was no possibility, much less an attempt, at concealment. It is a well established principle that fraud is never presumed, but must be satisfactorily proven. This rule applies to corporations as well as to men in their individual capacities. Although the plaintiff claimed a mortgage on the personality which was found to be invalid, it did not establish any fraud on its part in undertaking to enforce the claim under the mortgage. Knowing all the facts, or being bound to know them, these parties could not become creditors and then attack the transaction. If they were knowing and willing victims, they had no ground of complaint.

As to the rights of the creditors in class "A" as against the bondholders, the mortgage being sustained, we may not fully understand the plaintiff's contentions, owing to the complicated arguments presented, rendered necessary to meet the various phases the case might assume as the court might find with reference to the numerous questions raised. It is urged in case the mortgage lien should be set aside that all the holders of bonds should be

entitled to come in and share equally with these creditors. But that was settled adversely as to all of them, if they were all parties. See last two paragraphs opinion, 16 Wash. 522 (48 Pac. 737). While it was recited that the mortgage lien as to these creditors was set aside, or that they were entitled to a preference over the mortgage, a further direction was made, to the end that they be paid before the mortgage claims were paid, and this would follow from the theory upon which the case was disposed of at that time; for the mortgage was adjudged fraudulent in consequence of its having been given to secure what were then thought to be fraudulent claims, and on the ground that the stockholders and bondholders were identical. There were three different grounds upon which fraud might have been based; one, a fraudulent scheme in the formation of the company; another, although there was no fraud at that time, a fraudulent conduct and management of its business affairs later; and third, a fraudulent bringing of the suit for the purpose of preventing the general creditors from realizing anything. Importance was attached to the first and last grounds in rendering the opinion at that time, and the five appealing creditors are entitled to the benefit of it now, whether it was well based or not; and it would entitle them to priority over the claims of the bondholders, regardless of the mortgage, if they can be held as parties to the suit. We are not certain it is contended now by the plaintiff that the opinion heretofore rendered, and decree thereunder, were void as to any of the bondholders in consequence of their not having been before the court. But, as to this, it appears that nearly all of them were parties to the reorganization scheme in pursuance of which the foreclosure action was commenced; some were holders of stock, and some bought bonds after the suit was begun. There were

instances, however, where the bonds were evidently bought in good faith by parties who did not hold stock; but the mortgage provided that the plaintiff should be trustee for all the bondholders and have the exclusive right to bring suit upon the request of a majority; that no bondholder should be entitled to sue without first having made a request to the plaintiff to bring suit, and upon its refusal to do so. The bonds were similar in form, and it appeared upon the face of each that it was one of a large number secured by this mortgage and that the plaintiff was trustee for all of the holders; so each one had notice. And we are of the opinion that they were all parties, even if considered as general creditors, aside from the security, and bound accordingly, and that none of them would be entitled to a *pro rata* share of the proceeds with said five creditors, whether the mortgage be sustained or not.

A further claim was made by the appellant to the effect that these creditors in class "A" abandoned their right to priority in consequence of their having invited or assisted certain other creditors, viz., those in class "B," to come in and participate on paying them a percentage; but it appears that there was no intention on the part of these creditors in class "A" to relinquish their priority as against the plaintiff, and their claims would have been paid in full, even if those in class "B" were allowed to participate. We do not think they should be held estopped thereby.

There was a contention also by one of the respondents to the effect that there was a large amount of personal property not covered by the mortgage, the proceeds of which should be held for distribution among the creditors generally. As against this, it has been urged that there was no request for a separate sale of the personalty and that the decree provided for the sale of the property, both real and personal, as an entirety, which had not been appealed

from by the party raising the question. We think this is a sufficient answer to this contention. It probably is not very important, in consequence of the large number of creditors, including the bondholders, who would be entitled to participate in it and of the very small *pro rata* amount that would go to the general creditors, if it were separately distributed.

There was a further contention that this is a proceeding *in rem* and that all parties and creditors were bound by the proceedings and decision. The binding effects of the prior decision have been sufficiently discussed, and it is unnecessary to enlarge upon it. The contention now would be practically fruitless to those urging it, the mortgage being held valid as against them, and it being conceded that there is not enough property to pay the creditors in class "A" and the holders of the bonds, who would be entitled to a prior payment, as against these other parties, even though it were a proceeding *in rem*.

It has also been urged by the creditors in class "B" that this proceeding should be held similar to a railroad receivership, to the end that certain of their claims, which were for supplies used in the conduct of the business of the company and furnished within a few months prior to the appointment of the receiver, should be given precedence. This matter was noticed incidentally in the former opinion (16 Wash. 516; 48 Pac. 337), but was not expressly decided, although it was said that the plaintiff's contention that the payment of such claims out of current receipts was confined by the courts to railway receiverships, was amply sustained by many authorities; but it was intimated, under the facts then appearing, that the plaintiff might not be allowed to raise the question; but there was nothing conclusive in this, in any event, as against these parties now questioning it, and we are of the

opinion that the contention should not be sustained, because this receivership lacked the essential element of a railroad receivership, viz., that of maintaining the operation of the road for the benefit of the public, and we find nothing in the proceedings sufficient to estop the plaintiff from resisting such payment. The claim of the plaintiff in its own right is not urged against the holders of the bonds, and the effect of the former decisions of this court in the matter was to subordinate it to class "A" creditors. We hold that the creditors in class "A" are entitled to payment before anything is paid to any of the bondholders, and that the bondholders are next entitled to payment. It being conceded that there is or will not be enough to pay them, it is not necessary to pass upon the questions of priority between the remaining creditors.

Reversed, to be remanded accordingly.

Owing to the complicated and conflicting rights urged on these several appeals a period of thirty days will be allowed after the time for filing petitions for a rehearing has expired and after such as may be filed, if any, are disposed of, to the respective parties to make a written claim or showing as to which ones and against which ones costs of these appeals should be allowed, with the items claimed.

ANDERS and GORDON, JJ., concur.

DUNBAR, J. (dissenting).—I dissent. My understanding of the disposition of this case when it was before this court at its January term in 1897 was that this mortgage was held void as to the creditors who then appeared and to all others who stood in the same position as the creditors appealing. This is not exactly the language of the opinion, but it was my understanding of the opinion, and I think can be fairly gathered from the language used. These creditors in class "B" presented their claims under

the orders of the court after the case was remanded and upon application for a writ of prohibition this court decided that the court below was proceeding in an orderly manner to settle the claims, and it seems to me did settle them in accordance with the equities existing. But conceding that the prior judgment of this court only affected the standing of this mortgage in its relation to the five appealing creditors, I am of the same opinion now in relation to the merits of the controversy as I was when the case was here before. The appellants rely upon the decision of this court in *Kroenert v. Johnston*, ante, p. 96 (52 Pac. 605). I did not subscribe to the doctrine announced in that decision and never can as long as the laws in relation to the government of corporations exist as they do now. But this case, it seems to me, goes even beyond *Kroenert v. Johnston*, supra. It has been established by this court in common with most of the other courts of the Union that stock in corporations could be paid for in money or money's worth. Even this was a modification of the law and a concession in the interest of the corporation; but it was a harmless concession, for the term "money's worth" is well understood and not susceptible of two constructions. It means, of course, property worth the money, and not worth one-half or one-tenth of the money. Under this rule the real relations of the corporation with the creditors are not changed; for the corporation still has in its possession for the benefit of the creditors the full value announced. But it has never been a recognized rule in any court that I know of that corporations in their dealing with private individuals would be protected in a fraudulent estimate of their capital stock. I am aware that it is hard to realize the values that were honestly placed upon property of all kinds during the inflated period commonly called "boom times," and that it

makes a wonderful difference whether we are looking through the small or large end of the telescope, but the action of the corporation in this respect convinces me that it was the intention of the corporation to place a value upon its property which it knew did not in reality exist, for the purpose of obtaining credit and of selling its bonds. The majority says:

“It has been urged that the fact that some two million dollars of the stock was turned back into the corporation to be disposed of to assist in raising funds for the prosecution of the enterprise and was sold with the bonds for considerably less than its par value, goes to show that the projectors knew that the estimate was extravagant and fraudulent, but we do not think this in anywise tends to establish fraud as against these creditors.”

The opinion further states that

“The fact of an exaggerated value might have an important bearing under certain conditions; for instance, if the bondholders were here complaining that they had been deceived by an excessive valuation placed upon the property and had been led thereby into buying the bonds on the belief that they were amply secured, then the question would be brought directly in issue, for there was an intention to float the bonds of the company and many of them were disposed of to various parties, not all of them stockholders. But it is sufficient to say that no bondholder is complaining of any fraud.”

I cannot understand under what theory of law or ethics the fraud would be any more vicious or violent, if by reason of this exaggerated value bonds were sold to innocent purchasers, than it would be, if by reason of an exaggerated value, credit was obtained and goods secured which could only be obtained and secured by reason of the fraudulent holding out of the value of the property of the corporation. All the laws compelling these valuations and prescribing the actions of corporations in cases of this kind are for

the purpose of giving notice to the public and of protecting parties who deal with the corporations. It seems to me that these laws might as well be swept from the statute books, if it is to be coolly held that no fraud as against creditors can be predicated upon the action of a corporation in estimating and holding the value of its property at ten or twenty or a hundred times its actual value. Relying upon the expressed valuation of the property of the corporation one might readily loan a hundred thousand dollars to a corporation that, according to its showing and its representations solemnly made, had property worth five million dollars when he would not be willing to credit it for more than one-tenth that amount if its property was known to be of the value of \$100,000. There is no hardship imposed upon a corporation by compelling it to deal honestly, openly and above board with the public. In this instance, I think it is clear that the dealing has been exactly of the opposite character, that these creditors were deceived, that in effect a conspiracy has been entered into for the purpose of depriving them of their proportionate share of the proceeds of the estate of this corporation. In my judgment the findings of the lower court were right and should be sustained.

REAVIS, J. (dissenting).—I am constrained to dissent from the opinion of the majority of the court, and more particularly from the process of reasoning upon which the decision is based. That property may be taken by a corporation upon its organization in payment of the capital stock subscribed by a stockholder has been announced by this court heretofore and is the rule uniformly followed here. The payment of the capital stock must be made in good faith by the stockholder. So long as there are honest differences in the estimate of the market value of the property so taken in payment for stock, the valuation made

by the corporation and the stockholder should be a question of fact. I think the true rule is well stated by this court in *Adamant Manufacturing Co. v. Wallace*, 16 Wash. 614. This was the judgment of the whole court at that time, and it was there observed:

“It must necessarily follow, for the protection of creditors who dealt with these corporations, that the stock subscribed for must be paid in cash or in property of an equivalent value. In other words, the corporation must be in the actual condition which it represents itself to be in financially. If it were allowed to hold itself out as having a capital stock of \$100,000, when in reality the capital stock, which is and must be, under the theory of the law, assets in the hands of the corporation, is worth only one-half that amount, the corporation is to that extent doing business under false colors, and is obtaining credit upon the faith of an asserted estate which is purely fictitious. And where, by any arrangement between the shareholders and the corporation, the stock is issued as fully paid up, when in fact it has not been paid to the full amount of its face value, but has been paid in property of a fictitious or inflated value, a court of equity will compel a payment by the stockholder for the benefit of the creditor who has dealt with the corporation relying upon the asserted value of its assets to the full amount or face value of the stock. Such is almost the universal holding of the courts of the present day.”

The statute, §4266, 1 Bal. Code (1 Hill's Code, §1511) declares:

“Each and every stockholder shall be personally liable to the creditors of the company, to the amount of what remains unpaid upon his subscription of the capital stock.”

Section 4269, 1 Bal. Code (1 Hill's Code, § 1513) provides:

“It shall be the duty of the trustees of every company incorporated under this chapter to keep a book contain-

ing the names of all persons, alphabetically arranged, who are or shall be stockholders of the corporation, and showing the number of shares of stock held by them respectively, and the time when they became the owners of such shares, which book . . . shall be open for the inspection of stockholders and creditors of the company . . . and such book . . . shall be presumptive evidence of the fact therein stated in any action or proceeding against the company."

Section 4265, 1 Bal. Code (1 Hill's Code, § 1510) provides:

"It shall not be lawful for the trustees to . . . divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, unless in the manner prescribed in this chapter. . . . Provided, that this section shall not be construed to prevent a division and distribution of the capital stock of the company, which shall remain after the payment of all its debts upon the dissolution of the corporation or the expiration of its charter."

I think it apparent that the legislature has thus, as it might rightfully do in the formation of corporations, provided for the full payment of the capital stock of the corporation in money (but the courts have gone a step further and sanctioned a payment in money's worth); that the capital stock, if remaining unpaid, is always a trust fund for the creditors; and it would be trite to recall the presumption that the subscribers to the capital stock are deemed solvent, and that the fund thus created is really in existence.

The case of *Kroenert v. Johnston*, ante, p. 96 (52 Pac. 605) decided after that of *Adamant Mnfg. Co. v. Wallace*, supra, was by a divided court, Judge DUNBAR dissenting and the writer concurring in the result. I do not, however, think the reasoning in that case is the law, or in consonance with the better authority. I believe the rule

expressed in *Adamant Mfg. Co. v. Wallace, supra*, that, so far as creditors are concerned, subscriptions to the capital stock of the corporation must be fully paid for in cash or in property of an equivalent value, irrespective of any understanding shareholders may have among themselves as to the payment of stock or as to its value, is the true rule, and but a fair interpretation of the statutes of the state. It would seem vain legislation to subject stockholders to a personal liability to creditors for the full amount of their capital stock, to provide that the capital stock of a corporation should be kept intact until its dissolution, or so long as there are creditors, and to prohibit the transfer back to the corporation of stock subscribed for by a stockholder unless the capital stock is a real, tangible fund, and in the valuation of property taken in payment for capital stock it is the market value, not an imaginary speculative value that has no reality in existing markets. Thus, I do not think that property which was worth only \$100,000 when purchased by a corporation, could be taken in payment of \$5,000,000. This magic growth of value in a night outruns the tales of enchantment; and I am of the opinion that the capitalization of the Coal and Iron Company in this case was originally fraudulent. I recognize, however, that creditors who purchased its bonds in good faith should be protected. I merely desire to advert to the fact that an examination of the very voluminous record on this appeal indicates that a large number of the persons who purchased bonds secured by the mortgage paid between fifty and seventy-five per cent. and some as low as twenty-five per cent. of the face value of the bonds, and a large number of them received with each bond double the amount of the bond in capital stock of the company. Thus, stock which had never been paid for was by the corporation given to persons who purchased the bonds.

The fund which the legislature intended and created for the benefit of all the creditors of the corporation was thus dissipated, at least, and the purchaser of the bonds should fairly be chargeable with an observance of fair dealing, and in some instances in this case the whole of the bond and stock should be required to meet the liability on the stock before receiving the money due upon the bond. In other words, in equity and good conscience, he should not be permitted to assist some one in avoiding the liability upon the stock and yet take from the other creditors what he had paid upon the bond.

I do not deem it necessary to express any further view upon the facts of the case as now presented to the court.

19 516
19 706

[No. 2869. Decided June 20, 1898.]

A. HEMRICH, *Respondent*, v. KATHERINE WIST, *Appellant*.

PROMISSORY NOTES — VARIATION BY PAROL — WIFE'S PERSONAL LIABILITY.

In an action against a wife upon a joint and several note executed by herself and husband, an answer alleging a parol agreement that she was not to be held personally liable thereon, but had only signed it as a member of the community, does not constitute a defense.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

Ballinger, Ronald & Battle, for appellant.

Allen & Allen, for respondent.

Per Curiam.—This was an action upon a promissory note, joint and several, executed by Phillip Wist and Katharine Wist, husband and wife. The husband died

June, 1898.]

Opinion Per Curiam.

and an administrator of his and the community estate was appointed. The claim upon the note was presented to the administrator and payment was refused in consequence of its not having been presented within the time prescribed by the statute. A mortgage had also been given by said parties to secure the note. This action was thereafter brought against the wife upon the note; the answer set up the foregoing facts and alleged a parol understanding to the effect that she was not to be held personally liable thereon, but had only signed it as a member of the community. A demurrer to this answer was sustained and the appeal is therefrom. We are of the opinion that the demurrer was properly sustained. A defense of that kind should not be allowed to contradict the terms of the written instrument. No fraud was alleged as against the appellant in inducing her to sign the note, and we are of the opinion that her separate property became liable upon the contract. This has in effect been settled by prior decisions of this court. The respondent has asked for damages on the ground that the appeal was without merit and taken for the purpose of delay, but, being of the opinion that the appeal was prosecuted in good faith, this claim is denied.

Affirmed.

19	518
429	26

[No. 2937. Decided June 20, 1898.]

19	518
37	679
19	518
d39	68

THE STATE OF WASHINGTON, *on the Relation of W. S. Grinsfelder, Respondent, v. THE SPOKANE STREET RAILWAY COMPANY, Appellant.*

MANDAMUS TO RAILWAY COMPANY — OPERATION OF LINE — PRIOR DEMAND — PARTIES — QUASI PUBLIC CORPORATIONS — DISUSE OF FRANCHISES — DEDICATION OF STREETS.

Mandamus will lie to compel a street railway company to resume the operation of a line which it has discontinued without any prior demand for the performance of its duty to the public in that respect.

A private individual who has bought considerable property near the end of a street railway line and has improved the property and made his residence there, relying upon the operation of the line, has such a material interest as to be a proper relator in proceedings by mandamus to enforce the performance of the railway company's public duty to operate its line.

Where a street railway company attempts to discontinue the operation of a line, after acquiring the right and commencing the performance of the service, its duty to continue the operation of the railway may be enforced by mandamus.

A street railway company which has occupied public highways for several years in the operation of its line without a grant or privilege or franchise from the municipality, cannot urge that objection for the purpose of relief against its enforced continuance to operate its line thereon, when its use and occupation of such highways has been undisturbed.

A street railway company which receives its franchises from the state and enters upon the enjoyment of them cannot cease to perform the functions which were the consideration for the grant of such franchises without the consent of the granting power.

In platting an addition to a city and dedicating streets therein to the public, the dedicator cannot reserve the right to operate street railway lines upon the streets, as any condition annexed to a dedication falls, but the grant stands.

Appeal from Superior Court, Spokane County.—Hon. WM. E. RICHARDSON, Judge. Affirmed.

Thomas C. Griffiths, for appellant.

Graves, Wolf & Graves, for respondent.

The opinion of the court was delivered by

REAVIS, J.—Application by relator for a writ of mandamus to compel the defendant, a street railway company, to operate a line of street railway to Bell Park addition to the city of Spokane. The alternative writ, founded on the affidavit of relator, was demurred to by the defendant, and, upon the overruling of the demurrer by the superior court, defendant answered denying some of the facts stated in the affidavit and setting up new matter, to which reply was made by relator. Upon the issues raised a trial was had before the court without the intervention of a jury, and findings of fact made by the court. Defendant excepted to a number of the findings, because not sustained by the evidence, but we find substantial evidence to sustain each finding of the court, and, as this is a law action, the findings of fact by the court have the same force and effect as a verdict of the jury, and this court cannot therefore weigh conflicting testimony in the case.

The material facts found by the court are, substantially, that about the 17th of April, 1888, the Ross Park street railway company was incorporated under the laws of the state, for the purpose of constructing, equipping, operating and maintaining a system of street railways in the city and county of Spokane, for the transportation of freight and passengers, such railways to be operated by steam, horses or electricity; and likewise to borrow money and to secure the payment of the same by mortgage on its property and franchises. That subsequent to the incorporation, and from time to time until the spring of 1892, the Ross Park street railway company, by building, leasing and purchasing, operated a line of street railway commencing at the corner of

Howard and Riverside avenue in the city of Spokane, running thence along Howard street to Front street; thence on Front street to Olive street; thence east on Olive street to Hamilton street; thence north upon Hamilton street to Illinois avenue; thence east and northeasterly on Illinois avenue to C street; thence north on C street to Diamond street; and thence east on Diamond street to the northeast corner of block one of Bell Park addition to Spokane. That all of the streets mentioned were within the corporate limits of Spokane, to and including C street, and the remainder of the streets were in platted additions to the city. The line of railway extends to the intersection of Illinois avenue and Hamilton street near a point known as Martha avenue, to the town of Hillyard. The Hillyard line was built by a separate corporation known as the Arlington Heights Street Railway Company. Subsequently, in the year 1894, the defendant, through a corporation known as the Washington Water Power Company, acquired control of all the lines of Ross Park Street Railway Company and of the Arlington Heights Street Railway Company, and operated the same thereafter, until May, 1897, as one system. At that date a sale was made of all the lines of the Ross Park Street Railway Company by foreclosure of a mortgage executed to the Franklin Trust Company to secure payment of bonds, at which sale the Franklin Trust Company became a purchaser, buying all the property rights and franchises along the lines and appertaining thereto. On the same day a lease was executed by the Franklin Trust Company to defendant, by which the defendant covenanted to operate the said lines and pay, as rent therefor, one hundred per cent of the gross earnings to the Washington Water Power Company, the line of street railway running from Illinois avenue to the northeast corner of block one of Bell Park addition being expressly men-

tioned and described in the lease, and being a portion of the line covenanted by the defendant in the lease to be by it run and operated. Thereupon defendant entered upon, and continued under the lease to operate, all the said lines of street railway until a few days before the commencement of this action in December, 1897, when it discontinued that portion of the line from Illinois avenue to Bell Park addition. That at all times during the operation of these lines they were operated as one system, under one management, and passengers paid but one fare for the entire trip. In December, 1897, a short time before the commencement of this action, the defendant ceased to operate that portion of the railway line extending from the intersection of Illinois avenue and Hamilton street, at Martha street, to Bell Park, which in the findings of fact is designated as the Minnehaha Park line. Its poles, wires and tracks were, however, left in the street, and have been left there ever since, and the defendant has declared no intention to remove the same or not to recommence the operation of the line at some future date. There are about forty families living reasonably adjacent to the Minnehaha Park line, who are in the habit of using the same for street car facilities. There were daily carried over this line from eighty to one hundred and twenty people. A large number of these people have built houses there, improved their lands and yards and taken up their residence there, because of the street car facilities afforded by said line. The relator lives adjacent to this line, and several years ago commenced to reside there, and owns considerable property, which he has improved, relying upon the facilities afforded by this street railway line. No franchise was ever granted by the authorities of the city or county of Spokane to the defendant, or any of its predecessors in interest, for the occupation of Hamilton street, C street or Diamond street. At

the time the line along Hamilton street was built, Hamilton street was not within the city limits. In 1891 the addition within which lies Hamilton street was included within the limits of the city. C street and Diamond street have not yet been included in the corporate limits, but all the streets mentioned are within platted additions to the city of Spokane. Hamilton street was dedicated by the persons along the northeast addition to Ross Park addition, and in the dedication of the streets in that addition the dedicators reserved the exclusive right to lay street railways along the streets, and, prior to the building of the line, the defendant, or its predecessors in interest, received permission from the dedicators and owners of the property along the street to lay the same. Since Hamilton street has come within the city limits, the corporate authorities have not interfered with the occupation of the street by the railway company, and it has been in the undisputed use and occupation thereof. Along C street and Diamond street, a like reservation was contained in the dedication of the additions through and along which these streets ran, but no permission has been obtained from the dedicators or the adjacent property owners by the street railway company or its predecessors in interest to occupy said streets. It has, however, continuously occupied the same since 1892, and no objection has ever been made, so far as appears, by the county authorities, and at the time of ceasing to operate said line it was in undisturbed use and occupation of the said streets. All of the Minnehaha Park line and all of the Ross Park line run along and upon public streets of the city of Spokane, and public streets of additions thereto dedicated according to statute as public highways. The system operated by the defendant includes the major portion of the street railway mileage in the city of Spokane. It is not found what is the actual cost of operating the Minnehaha Park line. The

court found that a half-hour service on the Minnehaha Park line, run in connection with the Ross Park line, is a reasonable operation of the road, and is such an operation as the company has maintained for a period of over five years. No demand was made by any person upon the defendant to continue or resume the operation of the line. Upon the findings of fact the superior court entered judgment awarding a peremptory writ of mandamus commanding the defendant to run and operate an electric car or cars on that portion of this road in the city of Spokane and additions mentioned and described in the findings of fact as the Minnehaha Park line.

1. It is urged by the defendant, appellant here, that, no demand having been made upon it to resume the operation of its line, the action cannot be maintained. It is true that, upon the necessity of a previous demand and refusal to perform the act which it is sought to coerce by mandamus, the authorities are not altogether reconcilable. Mr. High says:

“The better doctrine, however, seems to be that which recognizes a distinction between duties of a public nature, or those which affect the public at large, and duties of a merely private nature, affecting only the rights of individuals. And while in the latter class of cases, where the person aggrieved claims the immediate and personal benefit of the act or duty whose performance is sought, demand and refusal are held to be necessary as a condition precedent to relief by mandamus, in the former class, the duty being strictly of a public nature, not affecting individual interests, and there being no one specially empowered to demand its performance, there is no necessity for a literal demand and refusal. In such cases the law itself stands in lieu of a demand, and the omission to perform the required duty in place of a refusal.” High, *Extraordinary Legal Remedies* (2d ed.), § 13. See, also, *Id.*, § 41.

In *Union Pacific R. R. Co. v. Hall*, 91 U. S. 343, there was under consideration an application by private parties to

compel the Union Pacific Railroad Company to operate its line as one continuous system into the town of Council Bluffs, Iowa. It was urged that these parties could not lawfully be relators in the suit, but it should have been brought by the attorney general of the United States, or the district attorney of the district of Iowa, because the object of the suit was to compel the performance of a public duty. The court concludes:

"There is, we think, a decided preponderance of American authority in favor of the doctrine, that private persons may move for a mandamus to enforce a public duty, not due to the government as such, without the intervention of the government law-officer."

In consonance with these views may be mentioned *State ex rel. Rice v. County Judge*, 7 Iowa, 186; *Virginia v. Rives*, 100 U. S. 313; *Attorney General v. Boston*, 123 Mass. 460.

In *Northern Pacific R. R. Co. v. Territory*, 3 Wash. T. 303 (13 Pac. 604), it was said by the court:

"No demand for the facilities required was ever made upon the company. That a demand would be necessary as a foundation of proceedings of this nature to establish a mere private right, is conceded; but it is claimed by appellee that this was a question of public right and that the company was neglecting to perform a duty which it owed to the public, and that in such a case a demand was not necessary. We think this claim is established by the facts and law of this case."

It may be noted that appellant did not deny that it had discontinued the operation of its street railway line indefinitely. The rule which requires a demand to be made before application to the court for a writ of mandate is founded upon reason; that is, it is unjust that defendant should be subjected to the payment of costs for a failure of some duty which it was willing to perform, had it been requested to do so.

In *Attorney General v. Boston, supra*, the supreme court of Massachusetts said:

“But where a municipal corporation or board has distinctly manifested its intention not to perform a definite public duty, clearly required of it by law, no demand is necessary before applying for the writ.”

The appellant's duty was a public one, due to the public, if due at all, and therefore falls within the rule announced by the best authority. Upon the facts found, it was not absolutely necessary for the relator to make a demand for the operation of the line.

2. It is also suggested that the relator has not such interest in the subject matter of the action as will enable him to maintain the action. It is shown, however, he has a material, individual interest in enforcing the performance of a duty to the public. *Union Pacific R. R. Co. v. Hall, supra*; *Loader v. Brooklyn Heights R. R. Co.*, 35 N. Y. Supp. 996; *Savannah & O. Canal Co. v. Shuman*, 91 Ga. 400 (17 S. E. 937, 44 Am. St. Rep. 43).

3. It is maintained by appellant that the facts failed to show any legal duty which it as a corporation is bound, either by law or its charter, to do or perform. The statute regulating mandamus in this state (Bal. Code, § 5755, Laws 1895, p. 117, § 16), is as follows:

“It may be issued by any court, except a justice's or a police court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.”

High's Extraordinary Legal Remedies, § 1, defines the writ as follows:

“The modern writ of mandamus may be defined as a command issuing from a common-law court of competent jurisdiction, in the name of the state or sovereign, directed to some corporation, officer or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law.”

The controversy is whether, under the principles of the common law, a corporation authorized to transact the business which appellant is authorized to do, and which it has actually transacted, in the acquisition and operation of its street railway lines, owes a duty to the public to continue the operation. The franchise was granted to appellant by the state, not for its profit alone or that of its stockholders, but in a large measure for the public benefit. Peculiar privileges were conferred upon it in consideration that it would provide facilities for communication and intercourse for the public. It is a common carrier. *New York, etc., R. R. Co. v. Winans*, 17 How. 30; *Booth, Street Railway Law*, § 1; *Talcott v. Pine Grove Township*, 23 Fed. Cas. 653. It was granted the power of eminent domain, a part of the sovereignty of the state, and, with the consent of the municipalities, it may lay its tracks over the public streets and highways. Such corporations, then, may not, by their own acts, disable themselves from performing the functions which were the consideration for the public grant. *Thomas v. Railroad Co.*, 101 U. S. 71.

The opening of a highway or ferry, and the common carriage of persons or property over them, was at common law a franchise and a matter of governmental concern. It was a part of the subjects in immediate possession of the sovereign power, and to exercise which demanded a special grant or charter from the sovereign. Such avocations, in their nature and history, are unlike the private avocations of milling, hotel keeping and traffic, which all may be pursued at

pleasure, unless restrained by the exercise of police power. Judge Kent says, in vol. 3, Commentaries, p. 458, that there are certain franchises which are understood to be royal privileges in the hands of a subject. The right to set up a ferry or road, and the taking of tolls, is one of them, and in this the public has an interest. In 2 Blackstone's Commentaries, 37, it is said that a franchise is a branch of the royal prerogative in the hands of the subject, such as the right of taking toll for a bridge, way or wharf. In *Prosser v. Wapello County*, 18 Iowa, 327, it was held by Judge DILLON that a public ferry franchise could only be conferred by the government, and must be founded on grant, license or prescription. Ownership of the soil on each side of a stream does not confer the right to establish thereon without a grant a public ferry at which tolls are charged. These rights, then, are held by the grantee, the holder of the franchise, as the agent and trustee for the sovereign power, and are in no sense private, but continue after, as well as before, the grant to be but a portion of the public interests. The absolute commercial and business necessity for permanence when established forbade, from the earliest years, the manifest impolicy of leaving this interest to the laws of supply and demand, which thus far have sufficiently supplied the community with hotels, mills, etc. And it is not in degree only that these franchises differ from mills and inns. The one is private property; the other is a public function, which originally resided in the government, and, when delegated to either persons or corporations, still retains the public use.

In *Gates v. Boston, etc., R. R. Co.*, 53 Conn. 333 (5 Atl. 695), it was said:

“One public right consists in the continuous uses of the railroad, its franchise and corporate property, in the manner and for the purposes contemplated by the terms of the

charter. All these corporate franchises and this property are held subject to, and charged with, this obligation."

In an early case, that of *King v. Severn & Wye Ry. Co.*, 2 Barn. & Ald. 646, a writ of mandamus was issued to compel the restoration of a tramroad and the re-laying of the track which the company had worn out. In *State v. Hartford, etc., R. R. Co.*, 29 Conn. 538, a railroad company was incorporated to construct and operate a railroad for the transportation of passengers and freight between certain main points. The road was constructed, and thereafter it discontinued operating its trains to one of the termini. The court said:

"We hardly know what doubtful principles of law are thought to be involved in the case. . . . All jurists and judges will at once agree that chartered companies are obliged fairly and fully to carry out the objects for which they are created, and that they can be compelled by mandamus to do it; and it will not be questioned that in the case of public highways, whether turnpikes or railroads, they are bound to keep them fit for use, and, in case of railroads, to keep them furnished with suitable cars, engines and attendants, without which they could not be used at all."

The supreme court of Maine, in *Railroad Commissioners v. Portland, etc., R. R. Co.*, 63 Me. 269 (18 Am. Rep. 208), compelled the erection and maintenance of a depot for freight and passengers upon a line of railroad. The supreme court of the United States, in *Union Pacific R. R. Co. v. Hall, supra*, upon the relation of private parties by mandamus, compelled the Union Pacific railroad company to operate its road as a continuous line from Council Bluffs westward. In *Potwin Place v. Topeka Ry. Co.*, 51 Kan. 609 (33 Pac. 309; 37 Am. St. Rep. 312), it was held that the performance of the duties which a street railway company owes to the public may be enforced by mandamus.

There lines of street railway were operated in connection with a system of railways in the city of Topeka, and then discontinued, when the law was invoked. In *San Antonio St. Ry. Co. v. State ex rel. Elmendorf*, 90 Tex. 520 (38 S. W. 54, 59 Am. St. Rep. 834), the supreme court of Texas held that, where a street railway company had undertaken the operation of its line upon certain streets, the public acquired a right to the operation of the lines which could be enforced by mandamus. It was also held that it was no defense to a writ of mandamus that a city might forfeit its franchise for failure to continue to operate its cars over a portion of the line; and it was further determined that an answer which set up that the operation of the line was a continual loss to defendant, that the revenues received were not sufficient to pay the actual expenses of its operation, and that if it continued the operation of the line the value of its whole property would be consumed and it would become bankrupt, was no defense, for the reason that, so long as it retained its franchise, it would not be allowed to urge, as an excuse for failure to perform the duties imposed by it, that it was non-profitable.

reverse held

A similar principle is sustained with regard to a canal company in *Savannah & O. Canal Co. v. Shuman*, *supra*, where a peremptory writ of mandamus was issued against a canal company requiring it to keep its canal in a navigable condition. It was also held that the answer of the defendant, that the operation of the canal was unprofitable, was no defense; that it could not retain its franchises and refuse to perform its duty.

In *Haugen v. Albina Light & Water Co.*, 21 Ore. 411 (28 Pac. 244), it was determined that a corporation formed for the purpose of supplying a city and its inhabitants with water, and which had laid its pipes in the streets of the city

for that purpose, could be compelled by mandamus to supply persons living along the streets with water.

Counsel for appellant has called our attention to two cases to support the position that mandamus cannot be maintained here; one, *People v. Rome, W. & O. R. R. Co.*, 103 N. Y. 95 (8 N. E. 369). But the statute of New York provided that a peremptory writ of mandamus is only authorized, in the first instance, "where the applicant's right to a mandamus depends only upon questions of law." In that case the material averments of the petition of the attorney general were put in issue, and the facts were that a short line of road was abandoned where there was another line, only two miles longer, that accommodated the same public. The court said:

"The present line [in operation] is a little longer than the one originally adopted and slightly varying therefrom, but it accommodates the people of the state and the people of the locality substantially as well as the line originally adopted. Suppose two roads were consolidated and the lines of the two between two places were parallel and near to each other, could the consolidated road be compelled by mandamus to operate both lines or could it discharge its duty to the public by using only one line?"

And the court concluded that one only was sufficient in that case. The conclusion in no wise negatives the established principle of the public duty owed by the railroad company.

The other authority is *State ex rel. Scully v. Canal and Claiborne Streets R. R. Co.*, 23 La. An. 333, which was an application for a writ of mandamus to compel the officers of a street railway company to collect from subscribers to the capital stock of the corporation their delinquent subscriptions. The relators were stockholders. The defense was that the amounts to be paid and the times of payment were, by the charter and agreement signed by the relators,

left to the discretion of the board of directors, and the provision was that "five per cent. of each subscription shall be payable at the signing of these articles, and the balance shall be paid at such times and in such amounts or installments as the board of directors may order." The court there held that, as a general rule, a writ of mandamus would not lie to compel an officer or a company to do an act coming within the range of their duties, where the law or the charter under which they act has vested in them a discretion to do or not to do it. The case is clearly not in point here, for no discretion is vested by our laws in the charter of a street railway company that would authorize its discontinuance of a street railway line which it had already established and operated. Permanency in the service of the public in a reasonable manner is an essential duty in all such avocations.

4. But it is also urged by counsel for appellant that it had no grant or privilege or franchise from the city or county to operate its tracks upon the public streets, and has simply a license from the owners of the additions through which these streets ran. But it has continuously occupied these streets, since 1892, with its lines, and no objection has been made by the city or county authorities to such occupation, and it is in undisturbed use and occupation of these streets. The city could not object now. *Spokane Street Ry. Co. v. Spokane Falls*, 6 Wash. 521 (33 Pac. 1072). We do not think it can urge this objection so long as it is undisturbed in its use of the streets. [We conclude that a corporation of the nature of appellant, receiving its franchises from the state and entering upon the enjoyment of them, cannot cease to perform the functions which were the consideration for the grant of such franchises without the consent of the granting power. The question of the public convenience is one which appeals to the discretion

of the court. The distinction between a franchise granted by the state of the right to exist and engage in peculiarly favored occupations, and upon which special and peculiar burdens are imposed, and the license granted by a municipality to such corporations to transact their business within its limits, was discussed by this court in a recent case. *Commercial Electric Light & Power Co. v. Tacoma*, 17 Wash. 661 (50 Pac. 592). It was there stated that an electrical company was a quasi public corporation, and might not, without the consent of the state, disable itself from the performance of its public duties by transferring its corporate privileges and franchises, but that it might transfer to others the privileges granted by the municipal corporation to perform its business in the public streets within the limits of the city. See, also, *Belleville v. Citizens Horse Ry. Co.*, 152 Ill. 171 (38 N. E. 584).

In platted additions to a town, when streets are laid out thereon, the fee belongs to the public. Bal. Code, § 1276. Elliott, Roads & Streets, p. 87; *City of Des Moines v. Hall*, 24 Iowa, 234.

If any condition is annexed to such dedication, the condition falls, but the grant stands. Elliott, Roads & Streets, pp. 88, 109 and 110; *City of Des Moines v. Hall*, *supra*, 241; *Richards v. Cincinnati*, 31 Ohio St. 506.

The judgment of the superior court is affirmed.

ANDERS and DUNBAR, JJ., concur.

June, 1898.] Opinion of the Court — DUNBAR, J.

[No. 2918. Decided June 22, 1898.]

WILLIAM D. RYAN, *Appellant*, v. NORTHERN PACIFIC
RAILWAY COMPANY, *Respondent*.

RAILROADS — INJURIES TO STOCK — FENCES IN INCORPORATED TOWNS —
FINDINGS OF TRIAL COURT.

That part of a railroad track within the limits of an incorporated town is not subject to the provisions of Laws 1893, p. 418, § 1 (Bal. Code, § 4332), making the failure of a railroad company to fence its track so as to turn stock *prima facie* evidence of negligence on its part in case of injury to stock by a moving train.

The findings of fact by a trial court, made in an action at law before it without a jury, will not be disturbed on appeal.

Appeal from Superior Court, Pierce County.—Hon. J. A. WILLIAMSON, Judge. Affirmed.

Murry & Scott, for appellant.

A. G. Avery, and *Crowley & Grosscup*, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This action was brought by appellant against the respondent, a railroad corporation, to recover damages for carelessly and negligently killing two cows within the corporate limits of the town of Buckley. The jury was waived, and the case was submitted to the trial court upon an agreed statement of facts. The court rendered judgment against appellant for costs, and an appeal is taken from such judgment to this court. The agreed statement of facts is to the effect that the respondent is a duly organized corporation; that the town of Buckley is a duly incorporated town; and that the cows came upon the track of the defendant and were killed by being run into by a passenger train within the corporate limits of the town of Buckley, at a place about five hun-

dred feet distant from the depot, and within the switch limits thereof.

The following are the verbatim stipulations of the important facts:

“ That within said switch limits is situated a depot building and platform, with the main track passing in front thereof in a straight line for a distance of about a quarter of a mile on either side of said depot, and a side track or switch passing in front of said depot building about ten feet beyond the main track and parallel therewith, for a distance of nearly a quarter of a mile on either side of said depot building. That said depot, depot grounds and tracks are so laid out and constructed for the convenient transaction of the business of said defendant company at said town, and are regularly used and are necessary for the accommodation of the public in the receiving and discharging of freight and passengers at said station, and were the usual and ordinary style of depot and station grounds used by said railway company along its line of road for such purposes at similar towns. That said station grounds were used by the public constantly in passing to and fro over and across the same, and the main public street of said town crosses said tracks and grounds next to said depot building.

That it would be difficult for said company to control and transact its business if it were to fence its track at said place, and would interfere with its operation of its road and transaction of its business and would greatly inconvenience the general public in traveling and doing business with said company, and would require the construction of cattle guards which would increase the peril to the lives of the employees of said company.

That said cows, just prior to the accident, were lying down on the left hand side of the main track, about ten feet from it, without the knowledge of plaintiff.

That when the engine was within about 150 feet of said cows they suddenly got upon the main track and ran in front of the engine for a distance of about 100 feet before they were struck by the engine, and that said cows were running at their utmost speed until so struck.

That the engineer of said train was occupying his usual place on the right hand side of the engine, and said engineer did not see said cows until they got upon the track. That said track was straight and the view thereof unobstructed for a distance of 2,000 feet from the place where said cows were lying, and said cows were in plain sight from said engine at said distance.

That said train was running at the rate of about fifteen miles per hour, and said engineer made no attempt to slacken the speed thereof or to stop said train, neither did he blow the whistle nor ring the bell, considering, in the exercise of his best judgment, that such action would have been of no avail.

That said rate of speed was the usual rate of speed at which passenger trains were accustomed to enter and pass said station.

That at the rate of speed said train was running it could have been safely brought to a standstill within a distance of 600 feet.

That there was nothing on either side of the main track to prevent said cows from getting off the track, and said cows could have remained where they were with perfect safety, and without being in a dangerous position.

That it is lawful for stock of all kinds to run at large within the corporate limits of the town of Buckley.

That it is dangerous for a train to strike an animal or like object upon the track when going at a slow rate of speed, as it is more liable to derail and wreck the train than when going at a greater rate of speed, so that the object may be struck with sudden force and thrown from the track.

That said track and said station grounds were not fenced so as to turn cattle away from the same."

Appellant claims that negligence may be predicated in this case upon one or more of the following grounds: (1) Failure of respondent to fence the track, thereby imposing *prima facie* evidence of negligence under the statute; (2) failure of engineer to observe cattle at a sufficient distance to have stopped the train or sounded an alarm; (3) failure of engineer after cattle jumped upon the track

to blow the whistle or ring the bell or endeavor to stop the train; (4) negligence in rate of speed at which train was running. Section 1, ch. 128, Session Laws of Washington, 1893, p. 418 (Bal. Code, § 4332) reads as follows:

“That in all actions against persons or corporations owning or operating steam railways in the state of Washington, for injuries to stock of any kind, except hogs, by collision with moving trains, it shall be *prima facie* evidence of negligence on the part of the defendant to show that the railroad track was not fenced so as to turn said stock from the track.”

It is contended by the appellant that incorporated towns are not excepted from the provisions of this act in relation to fencing, and several cases are cited to sustain the contention. An examination of them, however, convinces us that they are not in point, but that they were adjudications in states where there was an express statute demanding the fencing by railroad companies of their tracks, and it will be observed that there are no special provisions in our statute. The first case cited, viz., *Atchison, T. & S. F. R. R. Co. v. Shaft*, 19 Am. & Eng. R. R. Cases, 529 (6 Pac. 908) was construing an express provision of the statute requiring it to enclose its roads with a good and lawful fence, and it was held that, except where some paramount interest of the public intervenes, or some paramount interest or duty to the public rests upon the railroad company, an exception would not obtain, and that no private interest or convenience or inconvenience on the part of the railroad company would alone be sufficient to absolve it from fencing its road where the statute in express terms required that the road should be fenced. The cases generally are collated and discussed in this opinion, and in all of them there are implied exceptions, and a great many cases are cited holding that, as a rule, the company is not obliged to construct fences within the limits of incorporated

June, 1898.]

Syllabus.

cities or towns. And the cases holding to this rule, especially under statutes like ours, are so numerous and so overwhelming, and so almost universally establish the rule, that citations are unnecessary. So that in this case the statute does not even impose upon the respondent the burden of proof to show a lack of negligence of their part, but leaves the case to be decided upon the general principles of law applicable to such cases in the absence of rules of evidence established by statute. The questions whether, under the circumstances as shown by the stipulated facts, the engineer was guilty of negligence in not discovering the cattle before he did, or whether he was guilty of negligence in his conduct of the train after the discovery of the cattle, are questions of fact which were submitted to the lower court; and the court having found that no negligence had been committed by the engineer in respect to the questions mentioned, this court, under the general rule, which it has so often announced in cases of this kind, will not disturb its findings. There being nothing in the statement of facts which, as a question of law, could be determined to be negligence on the part of the respondent, the judgment will be affirmed.

SCOTT, C. J., and REAVIS and GORDON, JJ., concur.

[No. 2944. Decided June 22, 1898.]

JOHN HAMMARBERG, *Respondent*, v. ST. PAUL AND
TACOMA LUMBER COMPANY, *Appellant*.

MASTER AND SERVANT — PERSONAL INJURY — FELLOW SERVANT.

A millwright employed to make repairs and alterations about a mill and a sawyer engaged in operating a saw therein are not fellow servants; and where the millwright, while employed in

19	537
120	140
120	141

19	537
24	182
24	183
24	206

19	537
82	828
19	537
34	474

19	537
86	348

19	537
e38	553

19	537
e42	124

making alterations in the mill, above where the sawyer is at work, leaves a heavy chisel on a beam, from which it is jarred by the vibration of the machinery, causing it to fall and injure the sawyer, the latter can recover from their common employer for the injuries sustained.

Appeal from Superior Court, Pierce County.—Hon. J. A. WILLIAMSON, Judge. Affirmed.

Sharpstein & Blattner, for appellant.

Snell & Bedford, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The appellant is engaged in operating a lumber mill in Pierce county. The respondent was in his employ in the capacity of day laborer. A day or two before the occurrence of the injury for which he claims damages, the respondent was put to work on a cut-off saw in the mill, where he was working at the time the accident out of which the injury grew occurred. At the time the respondent went to work in the mill, millwrights were engaged in repairing some beams directly over the bench on which he was working. These beams were for the reception of shafting in connection with the lath mill, which was being removed from another part of the mill. The work of running the cut-off saw required no particular skill, any ordinary operator on the mill force being able to run this saw. One of the millwrights, Ninemire by name, had occasion to leave the work on which he was engaged for a few minutes, and he left on the beam which was over the bench on which respondent worked, and which, as we gather from the record, was a timber about ten inches square, a large chisel some two feet long and weighing, according to the testimony, from six to ten pounds. Presumably from the vibrations caused by operating the mill, the chisel fell off while respondent was stooping over get-

ting a stick to apply to the cut-off saw, and struck one of his legs, severely injuring him. For this injury this action was brought, and a recovery was had in the lower court.

Upon the conclusion of the respondent's testimony, a non-suit was asked by the appellant, which was refused by the court, and testimony was introduced by the defendant. There is no material conflict in the testimony. There is considerable testimony going to show that there were no particular vibrations, and that tools had been left on these beams and that they had never fallen off before; but this testimony is purely immaterial, for the reason that in this particular instance the chisel did fall off.

It is claimed by the respondent that it was the duty of the master to furnish a safe place for the workmen, and this proposition, of course, is not, and cannot be, questioned by the appellant. But the latter's contention is that the millwright, through whose negligence the chisel fell, was a fellow-servant of the respondent, and therefore that the master is not responsible. In fact, this is the sole question in the case.

✓ The history of the doctrine of fellow servants is exceedingly interesting, but its reading forces upon the mind of the student the conviction that the application of the doctrine has been unwarrantably extended. Its original application was based upon the plainest principles of justice, and the doctrine was applied to persons who were working in a common employment and who had an opportunity to observe, if not to a certain extent control, the actions and methods of those with whom they were working and who were in reality, under the plainest definition of the term, their fellow servants. Thus, so far as rural employments were concerned, if two men were engaged in loading a wagon with hay, and it was so overloaded or so unskillfully loaded that it toppled over, thereby injuring

one of the laborers, the master could not justly be held liable; and the doctrine of fellow servants, for obviously just reasons, was applied, for the laborers had in hand and under their control the performance of this work and were in a sense both of them agents or vice-principals of the master. In manufacturing employments it was the same. The doctrine was applied simply and humanely on the theory that, standing on a level with each other, both as to employment and authority, they had notice which the master necessarily could not have of the dangers liable to result from the action of the workers; and, in thus noticing and continuing in the employment without an attempt to rectify it, to them it was a disclosed or apparent danger, the perils of which they assumed, and the doctrine of non-liability of the master for the action of fellow servants must be sustained upon this principle, if sustained at all. But with the increasing of manufacturing and transportation business, with the complications arising from this increasing business and the introduction of new methods and new conditions, these plain principles, it seems to us, have been lost sight of by many courts, or rather their application has not been consistent with the changing conditions. Plain terms have received artificial, instead of common sense and practical, construction. The result has been exactly the opposite from the intention in the original application of the rule, and employees have been unjustly held responsible for the actions of persons in whose employment they had no authority, whose competency they had no way of testing, over whose actions they had no advisory control and no chance of observation, and, more than this, whose peremptory orders they were compelled to obey. The result has been that this principle, which in its primary application was just and beneficent, has been made, by inharmonious and indiscriminate application, to work oppressive

wrong. It is gratifying, however, to observe that recently judicial opinion seems to favor a restriction of the doctrine of non-liability for the actions of fellow servants, and the English rule, that a servant in command is a fellow servant, has been repudiated by a great majority of the American cases, and it seems now to be pretty well established that, in order to constitute one a fellow servant, he must be in the same common employment with the one who has suffered from his negligence. *Shearman & Redfield, Negligence* (4th ed.), § 234. And the question of whether particular employees are fellow servants is in some states submitted to the jury. *Mullan v. Philadelphia & S. M. S. Co.*, 78 Pa. St. 25 (21 Am. Rep. 2).

The rule was announced in that case that the risk which the laborer assumes from the neglect of his fellow is where they are co-operating in the same business, so that he knows that the employment is one of the incidents of their common service. It has been held in Georgia that none are deemed to be in a common employment who have no opportunity to use precautions against each other's negligence. *Cooper v. Mullins*, 30 Ga. 146 (76 Am. Dec. 638). And this, we think, is in strict consonance with the just theory upon which the rule was first recognized.

Applying these principles to the case at bar, it seems to us that the millwright, in this instance, could in no sense be considered a fellow servant of the sawyer below. He was not in the same employment. He was not engaged in manufacturing lumber, which was the business of the mill. The sawyer had no opportunity to use precautions against his negligent acts. It is the conceded duty of the master to furnish a safe place for the employee to work in. If the original construction of these beams had been faulty, there is no question of the liability of the master. If this chisel had been left upon this beam when the mill was originally

constructed and before the manufacturing business commenced, and had fallen off upon one of the workmen, it cannot be said that the master had supplied the workman with a safe place to work. It would seem that, so far as the rights of the workmen were concerned, no different principle could be brought to bear against his interests, when the chisel which caused the injury was left upon the beam after he had gone to work, and because the construction which the millwright produced was produced after the original construction of the building.

In *Sadowski v. Michigan Car Co.*, 84 Mich. 100 (47 N. W. 598), the court said:

“The rule adopted by the federal courts, and in most of the states, and which seems to us most in consonance with reason and humanity, is that those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools for labor, are engaged in a different employment from those who are to use the place or appliance when provided, and they are not therefore, as to each other, fellow servants. In such case, the one whose duty it is to provide and look after the safety of the place where the work is to be done represents the master in such a sense that the latter is liable for his negligence.”

In *Nord Deutscher Lloyd S. S. Co. v. Ingebregtsen*, 57 N. J. Law, 400 (31 Atl. 619, 51 Am. St. Rep. 604) the court, in discussing this question, says, among other things:

“In determining whether an employé, through whose negligence defects in the machinery have failed of discovery or repair, is a representative of the master in the discharge of the master's duty to the servant, or is a fellow servant of the latter, engaged in a common employment, many incongruous decisions have been rendered. On this topic a rational distinction would seem to be that, when the employé's duty to inspect or repair the apparatus is incidental to his duty to use the apparatus in the common employment, then he is not intrusted with the master's duty to his fellow servant, and the master is not responsible

June, 1898.]

Opinion of the Court — DUNBAR, J.

to his fellow servant for his fault, but that, if the master has cast a duty of inspection or repair upon the employé who is not engaged in using the apparatus in a common employment with his fellow servant, then that employé, in that duty, represents the master, and the master is chargeable with his default."

In this instance the master, through the millwright, was repairing or constructing a certain addition to this building. This was certainly a different employment from that in which the respondent was engaged, and the duty of the inspection of these repairs and of using the tools by which the repairs were made was a duty cast, by the very necessities of the employment, upon the millwright and not upon the sawyer. We think, therefore, that the millwright represented the master and, under the well recognized rule that the master cannot escape responsibility by delegating his power to another, we think the master in this instance was responsible for the negligent act of the millwright in leaving the chisel where it was liable to fall and injure workmen below.

We find no error in the giving or refusing to give instructions by the court, and the judgment will therefore be affirmed.

GORDON and REAVIS, JJ., concur.

ANDERS, J., not sitting.

[No. 2859. Decided June 24, 1898.]

HARRIET LOEWENBERG, *Respondent*, v. J. N. GLOVER
et al., *Appellants*.

CANCELLATION OF DEED — MISTAKE.

Where a wife's separate property was included with that of her husband and that of the community in a deed given by him to secure certain creditors, the deed will be set aside as to her separate property when it was included without her knowledge, she being induced to sign the deed hurriedly without reading, on the representation that only the community property and the husband's separate property were covered by the instrument, and when her property formed no part of the consideration for the release by the creditors of their claims and no rights of innocent third parties have intervened.

Appeal from Superior Court, Spokane County.—Hon.
LEANDER H. PRATHER, Judge. Affirmed.

Fenton, Bronaugh & Muir, Dolph, Mallory & Simon,
J. W. Whalley, and Winfree & Coman, for appellants.

Thomas C. Griffiths, for respondent.

The opinion of the court was delivered by

GORDON, J.—The object of this action is to cancel a deed of conveyance executed by Herman Loewenberg, Bernhard Loewenberg and the plaintiff, Harriet Loewenberg, to James N. Glover, as trustee, in so far as it purports to convey certain property described in the complaint, which is claimed by plaintiff in her own right, as her separate property. The decree of the lower court was in favor of plaintiff, and certain of the defendants have appealed therefrom. The undisputed facts in the case show that in the year 1889 the plaintiff, at that time and at all times since, the wife of Bernhard Loewenberg, purchased in her own right and with her separate funds the property involved

June, 1898.] Opinion of the Court—GORDON, J.

in this litigation, viz., three lots in the city of Spokane, the consideration paid therefor being \$5,500. Thereafter, from her own funds, she erected a residence thereon costing in the neighborhood of \$20,000, and at all times hereinafter mentioned continued to reside therein with her husband. At the time of the purchase of these lots by respondent, her husband, Bernhard Loewenberg, and his brother, Herman Loewenberg, were partners in the merchandising business in the city of Spokane. They were then in affluent circumstances, possessed of money and property amounting in value to upwards of one hundred thousand dollars, and were not indebted to any extent. On or about the first day of January, 1895, their financial condition had undergone a complete change, and at that time they were hopelessly insolvent, owing various creditors amounts aggregating a quarter of a million dollars. Among the creditors were the Merchants' National Bank of Portland, Oregon, the First National Bank of Portland, London & San Francisco Bank of Portland, the Old National Bank of Spokane, and Julius Loewenberg, as trustee of the estate of Abraham Loewenberg, whose claims amounted in the aggregate to about \$150,000. These claims were represented at Spokane, Washington, by L. B. Nash, an attorney of that city, and by John M. Gearin, an attorney of Portland, Oregon, who had gone to Spokane for the purpose of effecting an adjustment. And in the negotiations for that purpose Gearin and Nash co-operated throughout, and had full power and authority, in law and in fact, to represent their respective clients, and negotiate a settlement and adjustment of their claims. Julius Loewenberg, brother of Herman and Bernhard Loewenberg, was president of the Merchants' National Bank of Portland; and the claim of that bank against the firm of Loewenberg Brothers then amounted to upwards of \$50,000, in addi-

tion to which Julius Loewenberg, as trustee, was also a creditor in an amount exceeding \$12,000. Mr. Gearin went to Spokane in the latter part of December, 1894, and, in connection with Nash, immediately opened negotiations with the Loewenbergs for the purpose of getting the claims represented by the defendants in this action paid or secured. The Loewenbergs realized that they were in a condition of hopeless insolvency, and were desirous of securing and preferring the creditors represented by Gearin and Nash so far as it was possible for them to do so. This willingness on their part to prefer these Portland creditors was due very likely to the fact that their brother was president of the corporation which was the principal creditor, and Nash had been for years the attorney of the firm of Loewenberg Brothers. Confessions of judgment in favor of their respective clients were prepared by Mr. Gearin, but prior to executing the confessions it was considered by counsel that in view of threatened attachments by other creditors, the better plan would be to take a conveyance of the firm's property. The Loewenbergs were willing, and it was thereupon agreed that a bill of sale should be made of the entire stock of goods and personal property, and a deed of conveyance of all the real property owned by them, including also the community real property belonging to Bernhard Loewenberg and his wife, the plaintiff, and that James N. Glover should act as trustee for the various creditors represented by Nash and Gearin, under a declaration of trust. In consideration of such transfer and conveyance by the Loewenbergs, it was agreed that the claims represented by these creditors should be surrendered, canceled and discharged. Up to the time of arriving at this agreement, the property which is the subject of this action, and which is conceded to have been the separate property of the respondent, was not mentioned nor taken into considera-

June, 1898.] Opinion of the Court—GORDON, J.

tion, but the property to be transferred and conveyed in consideration of the cancelation of the indebtedness was to include only the property owned by the firm of Loewenberg Brothers and the separate property of the members of that firm, together with the community property of Bernhard Loewenberg and his wife. Mrs. Loewenberg, the respondent, at no stage of the proceedings figured in these negotiations. She was not consulted, and, so far as the record is concerned, it is not claimed or asserted that she was apprised of the negotiations, although, of course, the consummation of the agreement involved her signature to the deed which was to include the community property of herself and husband. It was at this juncture that Bernhard Loewenberg inquired of counsel as to the situation in which his wife's property—the home—would be left, and whether the other creditors could attach it. At least, the subject was introduced by him. Realizing that by conveying all of the firm's assets to some only of their creditors the hostility of the other creditors would be aroused, and desirous of avoiding any litigation concerning his wife's property, he seemed to consider that it would be better to include it in this deed of conveyance, indulging the hope that, when the trust was wound up, this property would be reconveyed to the wife. Up to this point the record admits of no dispute or contradiction. The lower court found, and the evidence is abundant to support the finding, that Nash and Gearin

“ then and there agreed with the said Bernard Loewenberg that if said property was placed in said trust deed it would, as soon as the trust was administered, be reconveyed to his wife, the plaintiff, and that in the meantime it would be protected from question and attachment by other creditors, and that his brother, Julius Loewenberg, would have the principal control of the execution of said trust, and that he could safely rely upon his brother carrying out such agreement and protecting the property of his said wife.”

Appellants' counsel argue that, if any such agreement was made, it was in fraud of other creditors, and that for that reason equity would decline to enforce it. But in urging this position we think counsel overlook the undisputed fact that this was the separate property of the wife, and in nowise liable for the indebtedness of the firm of Loewenberg Brothers. The conveyance of it could have worked no fraud upon any of the creditors of that firm, because, as matter of law, it could not have been made liable to the satisfaction of the firm's debts. But, in our view, it makes little difference whether there was any such agreement to reconvey, because, as we shall presently see, the plaintiff never in fact consented to, or had knowledge of, the inclusion of this property; and the defendants parted with nothing, and the plaintiff received nothing, on the strength of it. On the first day of January, 1895, the papers were prepared, but, that being a legal holiday, it was concluded that their execution should be deferred until the following morning, when, at the request of counsel for the creditors, a notary public was sent, with the deed to all of the real estate heretofore referred to (including the property herein involved), to the home of the Loewenbergs to procure its execution. The evidence shows that the notary public and the other witness to the deed went there before daylight, aroused the husband and wife and secured the execution and acknowledgment of the deed by both of them. The evidence clearly shows that the deed was not read over or explained to the wife, and that there was much haste, owing to the desire of the representatives of the creditors to get into possession before attachments could be levied. The complaint charged, and the lower court found, that at the time the respondent signed this deed she was not aware that it included the property here involved;

June, 1898.] Opinion of the Court—GORDON, J.

that she had never seen the deed until the morning it was executed, and did not read it then; that its contents were not made known to her by the notary; that she had been previously informed by her husband that the property to be conveyed was the real estate owned by the firm of Loewenbergs and the community real estate of herself and husband, and that it was not to include her own separate property; that she was not familiar with business, was laboring under great distress of mind owing to the financial condition of her husband and the failure of the firm, and that she would not have signed any deed conveying away her separate property had she known or been informed that that was its purpose. We think this finding is also fully supported by the evidence.

Counsel for the appellants vigorously assail the complaint, claiming that it states no cause of action in that it does not charge that the defendants or any of them perpetrated or had any knowledge of the fraud practiced upon the plaintiff by her husband; that none of the defendants made any misrepresentation to or in anywise deceived her; and that, while it charges that the plaintiff received no consideration, it does not allege that the defendants paid none. Counsel for the appellants throughout their entire brief seem to assume that the husband was the agent of the wife, with full power to contract concerning her separate real estate. There is not a particle of proof in the records which tends in anywise to show that Bernhard Loewenberg was the attorney in fact, or agent, or had any authority whatever, to make any contract or agreement with reference to his wife's separate real property. This assumption constitutes the fundamental error of appellants' position. While it is doubtless true that, in certain states which have the community system, the husband is the managing agent of both the community

real estate and the separate real estate of the wife, a different rule is expressly provided by statute in this state, in so far as the separate property of the wife is concerned. Section 1398, 1 Hill's Code (Bal. Code, 4489), is as follows:

"The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of her husband, and she may *manage, lease, sell, convey, encumber, or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him.*"

Under our law, the husband has not the management of, and has no control whatever over, the separate real property of his wife. The respondent testified that she did not know that the deed contained any description of her separate property; that she was informed by her husband that it did not, and was not advised of the truth until some three weeks after it had been executed, when she at once went to Colonel Nash and demanded that her property be reconveyed to her. At that time, and for a long time thereafter, litigation was pending between other of the firm's creditors and the defendants here, growing out of the transfer to the defendants of all of the property of the firm.

The evidence is sufficient to satisfy us that respondent postponed commencing her action in the hope, and we think she was encouraged to believe, that when the litigation was terminated and the trust administered her property would be reconveyed. It is not contended that the surrender of the firm obligations was in anywise made to depend on whether this property went into the deed. Mr. Gearin, the sole witness for the defendant, testified that he did not ask that it should be put in; did not know

June, 1898.] Opinion of the Court—GORDON, J.

anything about it until the husband inquired concerning its liability for the firm's debts, and the probability of the other creditors making his wife trouble concerning it. He testified that not a cent was paid for it, that he informed the husband that he "need not put that in if he did not want to . . . but I said, 'If it goes in, it goes in like all the rest.'"

From all of the circumstances, it appears that the husband conceived the idea of putting this property into the deed in order to avoid any claim to, or litigation over, it by hostile creditors whose claims were not provided for; that he fully expected it would be reconveyed when the litigation terminated; and that he concealed from his wife the fact that it was included, in order to avoid any possible delay or refusal upon her part to execute the deed, desiring, no doubt, to spare her any anxiety concerning its safety and, manlike, deeming himself the best judge of what was for her interest. It is enough, we think, to sustain the decree of the lower court, that there was no consideration for the conveyance of this property, and that plaintiff did not know and, under the circumstances, was excusable for not knowing, that the deed included the property in question. No question arises here as to the rights of third parties. If it became necessary to determine the question, we would, upon this record, be constrained to hold that the husband became the agent of the defendants for the purpose of securing plaintiff's signature to this deed, and that his representations and concealments were binding upon them. As already observed, she was never a party to the negotiations nor financially interested in them, no representations had been made to her nor had any promises been given by her, and, without prolonging the discussion further, we think the decree of the superior court was right, and it is affirmed.

DUNBAR, ANDERS and REAVIS, JJ., concur.

(No. 2858. Decided June 25, 1898.)

J. W. VAN BROCKLIN, *Appellant*, v. QUEEN CITY
PRINTING COMPANY, *Respondent*; H. N. RICHMOND
PAPER COMPANY, *Intervenor*, D. E. DURIE, *Receiver*.

INSOLVENT CORPORATION — PREFERENCE TO CREDITOR — CHATTEL MORT-
GAGE.

A chattel mortgage given by an insolvent corporation to a creditor for the purpose of preferring the mortgagee over other creditors is void.

Where the notes of an insolvent corporation are given to a stockholder in consideration of a purchase of his stock, not for the benefit of the corporation, but for that of a third person, such stockholder is not entitled to share in the assets of the corporation in the hands of a receiver, until after the claims of all other creditors, except those of stockholders for shares of capital stock, have been satisfied.

Appeal from Superior Court, King County.—Hon.
E. D. BENSON, Judge. Affirmed.

C. W. Turner, and *Julius F. Hale*, for appellant.

Emmons & Emmons, and *Vince H. Faben*, for inter-
venor.

John Kelleher, for receiver.

The opinion of the court was delivered by

REAVIS, J.—Plaintiff (appellant) commenced an action against defendant, the Queen City Printing Company, respondent here, upon certain promissory notes, and also filed his affidavit for an attachment, upon which a writ was issued and the property of the defendant corporation, consisting of a printing plant and stock, was taken into possession by the sheriff. Thereupon the defendant corporation appeared and, alleging its insolvency, asked for the appointment of a receiver, and such receiver was appointed.

Thereafter, the intervener, appellant H. N. Richmond Paper Company, made application for permission to intervene, and, upon an order allowing such intervention, filed its complaint setting up as a cause of action demands against the defendant corporation, which were secured by a chattel mortgage on the same property which had been taken into possession by the sheriff, and also a bill of sale intended as a mortgage of a portion of the same property. In the meantime, upon motion, the attachment was dissolved. Intervener asked that its mortgage be foreclosed and for the appointment of a receiver pending the foreclosure. The receiver, Durie, respondent, was then appointed by the court, who took possession of all the property of the defendant, being the same property which had theretofore been in possession of the first receiver. The receiver, Durie, also asked leave to file an answer and defend against the claims of plaintiff and the intervener. A number of other creditors also came into the proceeding and claimed amounts due them from the defendant corporation.

The receiver, Durie, in his answer to the complaint of plaintiff, alleged that the consideration for the promissory notes, the foundation of plaintiff's right of action, was the transfer of certain shares of stock held by plaintiff, who was a stockholder in defendant corporation, to the defendant for the benefit of E. C. Wilson, and not for defendant's benefit; and at the time of such transfer the defendant corporation was insolvent and the stock was worthless. In his answer to the complaint in intervention of the H. N. Richmond Paper Company, the receiver, Durie, alleged that the chattel mortgage which intervener sought to foreclose was executed when the defendant corporation was wholly insolvent, and was intended as a preference of intervener's claim over other creditors of the defendant cor-

poration. He also alleged that the bill of sale intended as a mortgage did not have the affidavit required by statute, that it was made in good faith without intent to hinder, delay or defraud creditors, and that it was not recorded as a chattel mortgage or as a bill of sale. Upon the issues made by the respective parties, a trial was had and the rights of all the parties adjudicated by the court. Findings of fact were made, and exceptions have been taken by plaintiff and intervener (appellants) to a number of them.

The record is one of considerable length, and upon its examination we find quite a conflict in the evidence. But the superior court had more favorable opportunities to make correct conclusions than are presented here, and we are content to accept its findings of fact, and they are conclusive of the case. They are substantially that the consideration for plaintiff's promissory notes in suit was a transfer by plaintiff to defendant of certain shares of stock in defendant corporation, owned by plaintiff and his son, and the notes were taken in payment thereof; that the defendant corporation was then insolvent, and its stock worthless, and that the stock was purchased, as alleged, for the benefit of one Wilson, and not of the defendant; that at the time of the execution of intervener's mortgage, set out in its complaint in intervention, the defendant was unable to pay its debts as they became due in the regular course of business, and the liabilities of defendant exceeded its assets; that the corporation was insolvent, and the mortgage was executed for the purpose of preferring the intervener over the other creditors of defendant; that the bill of sale held by intervener was in fact intended as a mortgage; that it did not contain the affidavit of good faith required by law, and was not recorded as a chattel mortgage or as a bill of sale; that there was due from de-

June, 1898.]

Syllabus.

fendant to intervener on the promissory notes and open account set out in the complaint in intervention the sum of \$2,405.48. Judgment was entered in favor of the plaintiff against the defendant for the amount claimed in the complaint, and the satisfaction of plaintiff's claim was awarded out of the assets of the defendant after the claims of all the other creditors of the defendant, except those of stockholders for shares of capital stock held by them, were satisfied, and intervener's mortgage was adjudged void as to all the other creditors. The proper judgment was entered upon the facts found by the court.

In view of the consideration and conclusion on the merits heretofore stated, it is unnecessary to determine the respective motions to dismiss the appeals or strike the statement of facts. The judgment is affirmed.

SCOTT, C. J., and GORDON and DUNBAR, JJ., concur.

[No. 2922. Decided June 28, 1898.]

JOHN E. BINGHAM, *Respondent*, v. HOWARD R. KEYLOR, *Appellant*.

ATTACHMENT—WHEN LIES—EQUITABLE ACTIONS—CONVERSION OF PARTNERSHIP PROPERTY—REPEAL OF STATUTE.

An attachment may issue in an equitable action, when the object is to recover a specified amount of money, under Bal. Code, § 5350, providing that the plaintiff at the time of commencing an action, or at any time afterward before judgment, may have the property of the defendant attached. (REAVIS, J., dissents.)

The act of 1854 as amended by Laws 1867, p. 97, making the conversion of partnership funds grand larceny, having been repealed by implication by Laws 1873, p. 251, which omitted such offense and declared that only crimes prescribed therein should be punished, an attachment will not issue on account of the

19	556
125	184
25	187
25	190
19	555
129	208

conversion of partnership property, as the statutory provision awarding the writ on the ground of injuries arising from the commission of some felony is inapplicable.

The action of a partner in collecting debts due the firm and refusing or neglecting to charge himself therewith does not fall within the provisions of Bal. Code, § 5351, subd. 8, authorizing attachment, where "the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought."

Appeal from Superior Court, Walla Walla County.—Hon. THOMAS H. BRENTS, Judge. Reversed.

B. L. & J. L. Sharpstein, and Thomas & Dovell, for appellant.

George T. Thompson, Wellington Clark, and E. W. Bingham, for respondents.

The opinion of the court was delivered by

GORDON, J.—The parties to this action were partners engaged in the practice of their profession as physicians and surgeons in the city of Walla Walla. The action was brought for a dissolution of the partnership, an accounting, and the appointment of a receiver. Subsequently to the commencement of the action, the plaintiff applied for and obtained a writ of attachment. The affidavit sets forth

"that the defendant and plaintiff being equal partners, the defendant has collected and converted to his own use \$15,000, owing to the partnership, and has fraudulently concealed and failed to charge himself with the same, or to account for the same, with the fraudulent intent to convert the same to his individual use."

As grounds for attachment the affidavit states: First, that the defendant is about to dispose of his property with intent to defraud his creditors; second, that the defendant has been guilty of fraud in incurring the obligation for which the action is brought; third, that the recovery is

June, 1898.] Opinion of the Court — GORDON, J.

sought for injuries arising from the commission of the crime of grand larceny. Defendant moved to discharge the writ, and the lower court having denied his motion, he has appealed. The questions to be considered here are: (1) Will an attachment lie under our law in an equitable action? (2) Has the act of the territorial legislature of 1854 (Sess. Laws, p. 75), as amended by the act of 1867 (Sess. Laws, p. 97), been repealed? And (3) do the acts of a partner who collects accounts and debts due the firm, but refuses or neglects to charge himself therewith, fall within subd. 8 of § 5351, Bal. Code (2 Hill's Code, § 289), which provides for an attachment where "the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought?"

Proceeding to an examination of these questions in the order above set out, we find that in New York, Missouri, Texas, Arkansas, and perhaps some of the other states, the right to an attachment in equitable actions is denied (*Thorington v. Merrick*, 101 N. Y. 5, 3 N. E. 794; *Brumback v. Weinstein*, 37 Mo. App. 520; *El Paso National Bank v. Fuchs*, 89 Tex. 197, 34 S. W. 206; *Buck v. Bransford*, 58 Ark. 289, 24 S. W. 103); while in Ohio, Iowa, and Illinois the right is distinctly affirmed (*Goble v. Howard*, 12 Ohio St. 165; *Ward v. Howard*, 12 Ohio St. 158; *Curry v. Allen*, 55 Iowa, 318, 7 N. W. 635; *Hansen v. Morris*, 87 Iowa, 303, 54 N. W. 223; *Humphreys v. Matthews*, 11 Ill. 471). See, also *Stone v. Boone*, 24 Kan. 337.

In § 2, vol. 1, Wade, Attachment, it is stated:

"Attachment is essentially a creature of the written law. Hence but little assistance can be obtained in discussing this peculiar remedy by looking beyond the statute by which it is authorized."

Our statute (§ 5350, Bal. Code, 2 Hill's Code, § 288) is as follows:

"The plaintiff, at the time of commencing an action, or at any time afterward before judgment, may have the property of the defendant, or that of any one or more of several defendants, attached in the manner hereinafter prescribed, as security for the satisfaction of such judgment as he may recover."

Under this statute we think an attachment may issue in an equitable action equally as well as in an action strictly legal, when the object is to recover money, and the nature of it is such as to enable the plaintiff to specify the amount of indebtedness; and where the object of the action is to dissolve a partnership and for an accounting, and it is shown that upon such accounting a balance will be due the plaintiff, we perceive no reason why the plaintiff may not have an attachment, provided, of course, he can and does specify in his affidavit the amounts of the indebtedness and some statutory ground for attachment.

2. Has the act of the territorial legislature of 1854, as amended by the act of 1867 (Sess. Laws, p. 97), been repealed? The effect of the amendment of 1867 was to make a partner who converted to his own use partnership assets guilty of grand larceny, and subd. 9 of § 5351, Bal. Code, provides for an attachment where "the damages for which the action is brought are for injuries arising from the commission of some felony." Appellant urges several objections to the validity of the act of 1867, but, in our opinion, they do not require notice, for we think the act (Laws 1867, p. 97) was repealed by § 325 of the act of 1873 (Sess. Laws, p. 251), which contained the following provision:

"All laws heretofore enacted on any subject matter provided for by this act are hereby repealed and hereafter judgments shall only be pronounced and enforced in criminal cases for crimes and offenses prescribed by this act."

And an examination of that act shows that the conversion of partnership funds is not included within its provisions.

June, 1898.] Opinion of the Court—GORDON, J.

3. We think that the defendant was not "guilty of a fraud in incurring the obligation for which the action was brought," within the meaning of subd. 8, § 5351, Bal. Code. It is admitted—indeed, the affidavit for attachment alleges—that the defendant and the plaintiff were equal partners. As such partner the defendant was entitled to receive on behalf of the partnership firm all that he is charged with having received. He became indebted to the partnership the moment he received it, and his subsequent failure to charge himself with, or otherwise account for, the moneys so collected, does not make him guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought. His lawful right to receive it in no way depended upon his subsequent conduct with reference to it. The failure of a partner to account to the firm for moneys collected by him affords no ground for attachment under subd. 8, *supra*. Suppose that the defendant had charged himself with everything collected, but had failed to pay over to his partner one-half or any part thereof, would not his legal liability be precisely the same as it is in the present case, no greater and no less? And surely in such case it could not be contended that his failure to pay would afford ground for attachment. The fact is that the indebtedness or obligation here involved was not induced or incurred by fraud. The fraud, if any, was subsequent to contracting the debt or incurring the obligation, and the indebtedness was not the result or consequence of any fraudulent transaction. In this respect we think the learned judge erred, and his order must be reversed. *Meyer v. Zingre*, 18 Neb. 458 (25 N. W. 727). The cause will be remanded, with direction to dissolve and set aside the attachment.

SCOTT, C. J., and DUNBAR and ANDERS, JJ., concur.

REAVIS, J.—I concur in the result, but do not think,

under our statute, an attachment can issue in an equitable action.

[No. 2517. Decided June 30, 1898.]

A. E. HART, *Respondent*, v. P. R. PRATT *et ux.*, *Appellants*.

LANDLORD AND TENANT—SURRENDER OF LEASE—EVIDENCE—AGENCY
—UNLAWFUL DETAINER—DOUBLE DAMAGES.

Although a lease for a term of years may be required by the statute of frauds to be put in writing, a writing signed by the lessee and delivered to the reversioner is not necessary in order to effect a surrender of the leasehold interest, if there are acts which are equivalent to an agreement on the part of the tenant to abandon, and on the part of the landlord to resume, possession of the demised premises.

A jury is warranted in finding that a tenant surrendered his interest under a lease, when the evidence shows he knew of the sale of the premises, and, after demand that he remove, gave up control of the property, offered to do work about the place in consideration of the use of the dwelling house occupied by him, and declined to leave in the end, on account of a difficulty he had with the purchaser's agent.

A tenant may make surrender of his interest under a lease to the reversioner's agent, as well as to the reversioner himself.

Declarations of a party to the record, not given for the purpose of impeachment, are admissible against him as independent evidence in chief.

Under Code Proc., § 564, double damages may be awarded against the defendant in an action of forcible entry and detainer, where there is substantially a claim for such damages stated in the complaint.

Appeal from Superior Court, Chehalis County.—Hon. MASON IRWIN, Judge. Affirmed.

W. H. Abel, and Hogan & McGerry, for appellants.
Austin E. Griffiths, for respondent.

June, 1898.] Opinion of the Court—ANDERS, J.

The opinion of the court was delivered by

ANDERS, J.—This was a proceeding under the statute relating to forcible entry and detainer (2 Hill's Code, § 547 *et seq.*; Bal. Code, § 5525 *et seq.*), to recover possession of a certain farm situated in Chehalis county, and particularly the possession of a certain dwelling house thereon. On June 10, 1894, the respondent, plaintiff below, and one J. H. Dowd were the owners of the premises in question, and on that day executed a written lease of the same, together with all the horses, cattle, hogs, farming machinery, tools, implements and other personal property used on said farm, and purchased therewith, with the appurtenances, for the term of three years. Respondent Hart was a resident of the state of Illinois and said J. H. Dowd was a resident of Kentucky. The former, at or about the time the lease was made, executed to one Hutchcraft, a general power of attorney, authorizing him, among other things, to sell her interest in the leased lands. The appellant P. R. Pratt, defendant below, was the agent of Dowd and authorized to dispose of Dowd's interest in the property. These lessees took possession of the farm and other property included in the lease, on or about June 20, 1894, and conducted the business of general farming thereon under a partnership agreement between themselves, up to June 20, 1895, at or about which time appellant Pratt, as he states in his testimony, ceased to take any part in the business.

The respective pleadings in the case are in some respects quite indefinite and contain allegations which might be construed to be inconsistent, but their sufficiency has not been challenged by either party, and we have therefore considered them as we think they were understood by all parties at the trial in the lower court. The complaint purports to state two causes of action, the first being forcible

detainer of a dwelling house, barn, etc., and the second an unlawful detainer of the lands in question generally, and of a certain dwelling house and appurtenances situated thereon in particular. But, inasmuch as it is alleged in the complaint that the premises were, on June 10, 1894, leased to appellant P. R. Pratt and his co-lessee, as we have stated, and inasmuch as the term had not expired at the time this action was instituted, it follows that the respondent was not entitled to recover upon either cause of action, unless appellant had actually surrendered his leasehold interest to the landlord; and whether or not he had surrendered his lease was considered the sole question for determination at the trial. The complaint alleged that, about the 20th of June, 1895, said defendants, acting by and through defendant P. R. Pratt and said Hutchcraft, for a valuable consideration, surrendered and yielded up said lease to said premises; and, on or about said date, said Dowd sold and conveyed to plaintiff all his right, title and interest in the said premises, and plaintiff became the sole owner in fee of said premises; and said defendants, after the surrender and termination of said lease as aforesaid, promised, undertook and agreed to vacate said premises on or about the expiration of three weeks from said 20th day of June, 1895, and to remove themselves, family and personal effects, horses and cattle, entirely therefrom, and to yield up the peaceable possession of said premises to the plaintiff. The answer denied that the lease was surrendered up and alleged that on or before the 20th day of June, 1895, one G. W. Maxon negotiated with the said Hutchcraft as the agent of plaintiff, and with P. R. Pratt, as agent of J. H. Dowd, to convey all of Dowd's interest in the premises mentioned in the complaint and known as the "Block-house Smith" farm, subject to all the incumbrances thereon; in consideration of which the said

June, 1898.] Opinion of the Court—ANDERS, J.

Maxon promised to convey to plaintiff and Dowd certain real estate in California; that thereupon, and on or about said date, said Hutchcraft, as the agent of plaintiff, purported to execute, and said P. R. Pratt did execute, as agents of their respective principals, quitclaim deeds to said Maxon of all of said premises, the deed executed by Pratt having blank grantee, and thereby conveyed unto the said G. W. Maxon all the interest of the said J. H. Dowd in and to said premises; that thereupon the said Maxon executed unto the said J. H. Dowd a quitclaim deed for certain real estate in California, and thereupon purported to execute to plaintiff a quitclaim deed to certain other real estate in California; that said Maxon was the agent of plaintiff in said transfer, and that the purported trade between plaintiff and Maxon was in reality no trade at all; that thereafter the said Maxon conveyed to plaintiff said premises set out in plaintiff's complaint; that thereupon said Hutchcraft, acting as agent of plaintiff, claimed that, by negotiations with said Maxon, defendant Pratt had surrendered and yielded up the lease which he and Hutchcraft had of said premises, and thereupon, acting as agent of the plaintiff, ordered and notified him to vacate said premises; that during the said negotiations said Hutchcraft, as agent of plaintiff, secretly requested defendant, P. R. Pratt, to allow said Hutchcraft to arrange a trade with said Maxon, and not interpose for fear Maxon could not be induced to close the contract; that defendant Pratt would not listen to the solicitations of Hutchcraft; that defendant, however, made representations to Maxon for the purpose of making him believe that the lease heretofore mentioned had been surrendered and yielded up. The plaintiff, in reply, admitted that said Maxon bought said premises from plaintiff and said Dowd, and conveyed to said Dowd certain real estate in California, and also

bought from plaintiff and Dowd all the personal property situated on said premises and used in connection therewith, in the tilling and stocking of said ranch, and that Maxon conveyed the same thereafter to plaintiff, and alleged that the transfer of said premises, together with the personal property thereon, and the surrender and termination of said lease, constituted one transaction, and that the defendant and Hutchcraft represented said Dowd and plaintiff in said transfer. The cause was tried to a jury, and they returned a verdict for plaintiff and assessed her damages in the sum of \$62.50. Judgment was thereafter rendered by the court in favor of the plaintiff in double the amount of damages found by the jury, under § 564 of the Code of Procedure (Bal. Code, § 5542).

It was not claimed at the trial, nor was there any evidence to show, that the lessee, Pratt, had delivered to his lessor, or to the owner of the leased premises, any instrument or memorandum in writing surrendering his leasehold interest; and appellants claim that a surrender could only be effected by some writing signed by the lessee and delivered to the reversioner, and that the case ought not to have been submitted to the jury. While it is true, as a general proposition, that a surrender of a lease, considered as a conveyance of an interest in realty, can only be effected by some deed or other writing, under the statute of frauds, when such writing is necessary to the creation of the lease, it is equally true, under the authorities, that a surrender may result either from the express agreement of the parties, if acted upon, or by operation of law. Upon this proposition the law is stated by Wood in his work on Landlord and Tenant as follows:

“A surrender may arise either from the express agreement of the parties, or by operation of law. And, whenever a surrender is implied from the acts of the parties,

June, 1898.] Opinion of the Court—ANDERS, J.

it is a surrender by operation of law. This inference may be drawn from anything which amounts to an agreement on the part of the tenant to abandon, and on the part of the landlord to resume, possession of the premises." 2 Wood, Landlord & Tenant (2d ed.) p. 1174.

And Mr. Gear says:

"A surrender may be inferred from the circumstances and conduct of the parties, evincing that both agree to consider a surrender as made." Gear, Landlord & Tenant, § 192.

And it was said by the supreme court of Massachusetts that any acts which are equivalent to an agreement on the part of the tenant to abandon, and on the part of the landlord to resume, possession of the demised premises, amount to a surrender of the term by operation of law. *Talbot v. Whipple*, 14 Allen, 177. See, also, *Amory v. Kanoffsky*, 117 Mass. 351 (19 Am. Rep. 416); 12 Am. & Eng. Enc. Law, 758h-758j; *Bedford v. Terhune*, 30 N. Y. 453 (86 Am. Dec. 394); *Wheeler v. Walden*, 17 Neb. 122 (22 N. W. 346); *Baker v. Pratt*, 15 Ill. 568.

Such being the law, the question arises whether the conduct of the parties and the surrounding circumstances warranted the inference of the jury that Pratt had surrendered his interest under the lease. It appears from the record that, when the lease in question was made, the land included therein was heavily mortgaged, and that prior to June 20, 1895, one of the mortgagors was threatening to foreclose, and that appellant Pratt was aware of that fact; that he went to the city of Seattle for the purpose of selling his interest in the land; that while there, and after unsuccessful efforts to sell to several parties, he finally found a man by the name of G. W. Maxon to whom he proposed to sell a one-half interest in the land and everything connected therewith, and who agreed to go and ex-

amine the property with the view of purchasing it. Maxon, however, instead of going immediately to the farm, went to his home in Portland, Oregon, and subsequently wrote to Mr. Pratt that he had concluded not to purchase a half interest in the premises, and on June 13, 1895, he wrote to Pratt and Hutchcraft as follows:

"I will make you the following offer, viz., I will give you the 320 acre ranch near Centerville, subject to incumbrance, as you understand, including crops, for your 884½ acres, including all of the partnership personalty, stock, crops, etc., subject to incumbrance, as understood. I do not care to trade for an undivided interest. Now, if this proposition suits you, wire me and I will go up and close the matter at once."

This proposition was accepted, and Maxon accordingly went to the farm, and, after viewing it, proceeded to consummate the agreement. Pratt at that time had a deed from Dowd of his interest in the land, with grantee's name in blank, and that deed was delivered to Maxon, together with a deed from respondent for her interest in the premises. A bill of sale of all the personal property included in the lease and also the hay, grain, crops and utensils, etc., owned by respondent and Dowd, was also delivered to Maxon. Maxon thereupon deeded certain lands in the state of California to respondent and certain other lands to the said J. H. Dowd, in accordance with his original proposition. Hutchcraft testifies, in effect, that, after that was done, Maxon put everything in his charge and then stated to appellant, P. R. Pratt, that he would give him three weeks to remove his family and effects from the premises, but no longer. This testimony was not denied by appellant. It is also shown by the evidence that, at the time the deeds just mentioned were executed, Maxon called for the lease held by Pratt and Hutchcraft; but it could not be found with the other papers that were delivered

June, 1898.] Opinion of the Court—ANDERS, J.

to Maxon, each of the lessees supposing that the other had it. Hutchcraft, however, says that it was considered as surrendered up at the time; and it appears to have been so considered by Maxon, else he would not have assumed to control the possession of the premises. And, moreover, it is in evidence that at the time of this trade, on June 20, appellant Pratt agreed to milk the cows then on the ranch, in consideration of the use of the dwelling house occupied by him. It was shown by the testimony of numerous witnesses that, about the time of this transaction, Pratt stated to them that he had "sold out" and was going to California or to Puget Sound. One of the witnesses testified that about June 20, 1895, Pratt wanted to rent his house, saying that "Hutchcraft was talking of putting him out of the house and in case he had to go sooner than he was ready, he wanted to move into my (witness's) house." The evidence further discloses that Mr. Pratt virtually gave up all control of every part of the premises covered by his lease except the dwelling house which he was then occupying, and the barns and sheds used in connection therewith, and that he and Hutchcraft submitted the settlement of their partnership affairs to arbitration. It is true that Mr. Pratt says he did not intend to surrender his leasehold interest, but he admits he expected to sell it to Maxon thereafter. But it appears to us from the evidence, including his own, that Pratt finally concluded not to leave the farm within the time limited by Maxon, on account of a difficulty he had with Hutchcraft on or about the 22d of June, and not because he had not promised and intended to leave. In fact, Mr. Pratt stated, in effect, to some of the witnesses who testified in the case, that he was not questioning the sale, but the "underhanded manner" in which he thought Hutchcraft had gotten the possession of the farm. It appears that, after the

deeds from Dowd and respondent had been given to Maxon, he started for home and was accompanied by Hutchcraft as far as the city of Centralia, and that, while there, Hutchcraft purchased the premises, and the property included in the bill of sale above mentioned, from Maxon, for the respondent for the sum of \$600 and certain real estate; but, instead of making a new deed from Maxon to respondent for the interest bought of Dowd, the respondent's name was inserted in the Dowd deed, thus making it appear to be a purchase directly from Dowd, instead of from Maxon, as the fact really was. The court, however, instructed the jury, in substance, that that fact made no difference to Pratt as he could in no way be injured thereby, and no objection was made to the instruction. In fact, no exceptions were taken to any part of the court's charge to the jury. In view of all the facts and circumstances of the case, including the acts of the parties, we think the jury were warranted, under the instructions of the court, as to the law, in concluding that the appellant intended to, and did, surrender his leasehold interest to Maxon as a part of the transaction of June 20, 1895.

But appellants insist that the court erred in receiving in evidence the declarations of Pratt, as testified to by these various witnesses, on the ground that no sufficient foundation had been laid for their introduction. But it is a sufficient answer to this contention to observe that the testimony was not given for the purpose of impeachment, but was adduced as independent evidence in chief, and it was therefore admissible as the declarations of a party to the record. 1 Greenleaf, Evidence (15th ed.), § 171.

It is also contended by appellants that there was no surrender of the lease, for the further reason that the surrender, if made at all, was to Maxon, and that he had no interest in the premises, and therefore was not entitled

June, 1898.]

Syllabus.

to accept a surrender of the lease. Under the familiar rule that a surrender must be made to the lessor or to the party who has the immediate estate in reversion, it would appear from the allegation of the answer that the land was sold to Maxon; that, as against appellants, Maxon was the reversioner. If, however, the other allegation be true, that Maxon was but the agent of the respondent, then the same result would follow; for if the surrender was made to respondent's agent and accepted by him for her, it was equivalent to a surrender to her in the first instance.

There does not appear to be any substantial foundation for appellants' contention that the court had no right to give judgment for double damages, under the rule announced by this court in *Hall & Paulson Furniture Co. v. Wilbur*, 4 Wash. 644 (30 Pac. 665), and *Gaffney v. Megrath*, 11 Wash. 456 (39 Pac. 973). Such damages were substantially claimed in the complaint, and were therefore recoverable under the rule laid down in those cases.

Upon the whole case, we are of the opinion that the judgment should be affirmed, and it is so ordered.

SCOTT, C. J., and DUNBAR, GORDON and REAVIS, JJ., concur.

[No. 2845. Decided June 30, 1898.]

LANDES ESTATE COMPANY, *Respondent*, v. CLALLAM COUNTY *et al.*, *Appellants*.

TAXES—FRAUDULENT ASSESSMENT—TENDER.

An erroneous assessment of property for taxation will not be interfered with by the courts, unless a substantial overvaluation is clearly established.

19	569
24	374
19	569
25	381
19	569
26	478

A finding of the court that an assessment of certain lands was fraudulent and excessive is warranted, when the evidence shows that the assessor informed the landowner that the valuation for the current year would be the same as the year before; that the land owner relied upon such statement; that the assessor in fact largely increased the valuation, which was not corrected by the board of equalization, owing to an oversight; that the land owner had no knowledge thereof until after the adjournment of the board of equalization; and that the real value of the land was the same as that placed upon it the year before.

One who brings an action to obtain a reduction in the amount of his assessment need only tender, under Code Proc. §§ 676, 677 (Bal. Code, §§ 5678, 5679), the sum averred in good faith to be justly due, and offer to pay any further sum that may be found due; and the finding in such case of a larger amount due by the court would affect only the question of costs.

Appeal from Superior Court, Clallam County.—Hon. J. G. McCLINTON, Judge. Affirmed.

George C. Hatch, for appellants.

Benton Embree, for respondent.

The opinion of the court was delivered by

SCOTT, C. J.—This action was brought to obtain a reduction in the assessment of taxes on certain real estate for the years 1895-96, on the ground that it had been fraudulently assessed at much more than its true value. A tender was made of what the plaintiff averred to be the amount of taxes justly due. A trial was had and a reduction made, but not as low as the plaintiff claimed. The defendant has appealed. It was alleged, and the court found, that at the time of making the assessment the assessor or his deputy informed the plaintiff that such assessment would be the same as for the year 1894, or that it would not exceed that amount, but thereafter in fact assessed the property for a largely increased amount, and that the plaintiff, relying upon said representations and having no notice of the valuations placed on the property by the assessor, did

June, 1898.] Opinion of the Court—Scott, C. J.

not go before the board of equalization and ask for a reduction, and did not know of such exorbitant valuations until a long time after the board had adjourned. There is no contention that the plaintiff did not act diligently when it obtained the knowledge.

The court found the value of the property to be the same as that placed upon it in 1894, and also found that the board of equalization, on account of an oversight, did not consider or equalize the valuation of said lands with that placed upon other lands in the vicinity, but would have done so but for such unintentional omission, and that said property was assessed for much more than like property in the vicinity. The finding of the court on the matter of the assessment was, in substance, that it was a fraudulent one, and we are of the opinion that the evidence was sufficient to sustain it.

We fully concur in the appellant's argument to the effect that an assessment ought not to be interfered with unless a substantial overvaluation is clearly established; but, without entering into the details of the several assessments discussed by appellant, we are of the opinion that the reduction granted by the court was a substantial one. Questions are raised relating to the admissibility of certain of the evidence, but it is unnecessary to set them forth in detail, for some are immaterial, and there is enough competent, unquestioned proof to sustain the findings.

It is contended that no sufficient tender was alleged, but the complaint contains a direct allegation of the tender of the taxes for the years 1895-96, of the amount that the plaintiff alleged to be justly due, and that the same was made good by bringing the amount into court; and this was not denied. The real contention, however, is that the tender was insufficient, under §§ 676, 677, 2 Hill's Code (Bal. Code, §§ 5678, 5679), because the court found that

more was due than the sum tendered. If the plaintiff is bound, under this statute, at his peril, to tender a sum adequate to cover what the court may thereafter find to be a just tax, in order to maintain his action, he would be largely deprived of any benefit thereby; for, if his tender should be too small, his action would be dismissed, and, if too large, he would lose the excess. We think the statute is complied with by averring the amount justly due, and the tender of it, keeping it good and offering to pay such further sum as should be found due, if any, if such tender is made in good faith; and that the finding of a larger amount by the court, where the plaintiff had acted in good faith, could only affect the question of costs.

Affirmed.

REAVIS, ANDERS, GORDON and DUNBAR, JJ., concur.

[No. 2924. Decided June 30, 1898.]

GEORGE H. HULL, *Appellant*, v. JOSEPH STEPHENSON
et al., *Respondents*.

HIGHWAYS — ALTERATION AND ESTABLISHMENT — ORDER OF COUNTY
COMMISSIONERS — APPEAL — PARTIES.

A final order of the board of county commissioners vacating a road and establishing another, in lieu thereof, is appealable.

Under Laws 1895, p. 82, § 2, giving a landowner residing in the vicinity the right to petition for the establishment of a county road, although he does not own lands abutting thereon, the qualification to petition for the road carries with it the right to resist, if so desired, and consequently the right of appeal from an adverse decision.

Appeal from Superior Court, Yakima County.—Hon. JOHN B. DAVIDSON, Judge. Reversed.

June, 1898.] Opinion of the Court—Scott, C. J.

Whitson & Parker, for appellant.

Vestal Snyder (*E. B. Preble*, of counsel), for respondents.

The opinion of the court was delivered by

Scott, C. J.—One John Stone and others, by a petition in writing, made application to the board of county commissioners of Yakima county for the alteration of a county road by vacating the same and the establishment of another in lieu thereof, under the act (Laws 1895 p. 82; Bal. Code, § 3771 *et seq.*).

The appellant, being the owner of certain lands situate in said road district, and a resident and taxpayer therein, with other residents and taxpayers residing in the vicinity of said road, filed with the board a remonstrance in writing, protesting against the vacation and discontinuance of the established road and the establishment of another in lieu of it, as petitioned for. Thereafter a hearing was had before the board of commissioners, and after reciting certain matters set forth in the petition and that they had examined the report of the viewers and the petition and remonstrances, and heard all the testimony for and against the proposed alteration, and were fully advised in the premises, the board made an order vacating the road proposed to be vacated and establishing the other as prayed for in the petition. Whereupon an appeal was taken to the superior court of said county. The respondents moved to dismiss it on two grounds: First, that the order was not an appealable one; and, second, that it did not appear that appellant had legal capacity to take such appeal. The superior court granted the motion to dismiss, and an appeal was taken to this court.

In support of the proposition that the order was not an appealable one, respondents cite *Lawry v. County Com-*

missioners, 12 Wash. 446 (41 Pac. 190), and *Olympia Water Works v. Thurston County*, 14 Wash. 268 (44 Pac. 267). But we are of the opinion that neither of these cases applies. In the first case it was said, in substance, that it was manifest that it was only intended to give the right of appeal to parties to ordinary proceedings before the board, or to persons directly interested therein, or who had properly presented a matter before the board for their determination, etc., and it was held in that case that the order was not an appealable one, under General Statutes, § 298 (1 Hill's Code), as the duties resting upon the board of commissioners with reference to county seats were separate and distinct from their ordinary duties; and this was substantially the holding in the second case cited, being that said statute did not apply to matters coming before the board when sitting as a board of equalization, such as determining the value of property listed for taxation. But the matter of laying out and discontinuing county roads is made a part of the general duties of the board, and may be brought on for action at any session. See § 281, subd. 2, 1 Hill's Code (Bal. Code, § 342). This appeal was taken from a final order, in relation to which the board had heard evidence as to the several matters upon which they must pass; one of which was whether the alteration of the road and the establishment of another, as petitioned for, would be of public utility. We think an appeal would lie from the order, under said statute.

It is contended that the appellant had no right to take the appeal to the superior court, because it did not appear that he was interested in land abutting on the road to be vacated, or on the road to be established, and for that reason that he could not be an interested party. We do not think this would hold good; for a party might be directly interested in such a matter, although he did not

July, 1898.]

Syllabus.

own any lands directly abutting upon the road to be vacated, or the one to be established in lieu thereof. This might affect the degree of his interest, but he might have a direct, valuable and substantial interest without such ownership, entirely different from that of a person residing in a remote part of the county. This appellant made himself a party to the proceeding by appearing before the board and remonstrating. He would have been a competent petitioner for the road, under § 2 of the act (Bal. Code, § 3772), as he resided in the vicinity. The right to petition is not limited to persons owning land abutting upon the road to be vacated or established. Being competent to petition for the establishment of the road, he certainly would have a right to resist it, and consequently could appeal, under said section, from a final adverse decision.

In consequence of the foregoing, it is not necessary to consider whether § 1978, 1 Hill's Code, is in force. Reversed and remanded for trial.

REAVIS, DUNBAR, GORDON and ANDERS, JJ., concur.

[No. 2936. Decided July 1, 1898.]

PETER ANDERSON, *Respondent*, v. INLAND TELEPHONE
AND TELEGRAPH COMPANY, *Appellant*.

MASTER AND SERVANT — INJURIES TO SERVANT — CONTRIBUTORY NEGLIGENCE — ELECTRICAL APPLIANCES.

A lineman in the employ of a telephone company, among whose duties was the inspection of poles and wires, and who was equipped with apparatus for testing electric insulators, was chargeable with contributory negligence, as the direct cause of injuries received while climbing a pole used jointly by the telephone company and an electric railway, by reason of his coming in contact with a guy wire supporting a trolley wire, which had

19	575
222	92
19	575
30	368
431	473
31	590
19	575
37	506
38	460
38	470
19	575
39	273
39	393
39	636
39	637

become highly charged with electricity, owing to the breaking of an insulator, when by the exercise of care on his part he could have learned of the danger.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Reversed.

Blake & Post, for appellant.

Wirt W. Saunders, and *W. J. Thayer*, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The respondent, a servant of the Inland Telephone & Telegraph Company, brought an action against the said telephone company and the Spokane Street Railway Company. The complaint alleges that at the time the accident occurred, the plaintiff was a lineman in the employ of the Inland Telephone & Telegraph Company; that the two defendants used in common a pole located on the corner of Olive and Hamilton streets, in the city of Spokane; that the telephone company used said pole for holding up telephone wires, and the street railway company had fastened to said pole a span wire or guy wire, which ran to the pole from the trolley wire used by the street railway company; that the plaintiff ascended said pole for the purpose of stringing a wire on the pole, and, while on the pole, came in contact with the span wire belonging to the street railway company, touched the same, received an electric shock, and fell to the ground, breaking his leg as a result of said fall; that the wire which plaintiff touched, which belonged to the street railway company, was not designed or intended to carry electricity, but was used as a support for the trolley wire used by said street railway company, but through the careless and negligent acts of the street railway company, said wire was at the time charged with a strong current of electricity, and was negligently left by the street railway company uninsulated,

July, 1898.] Opinion of the Court—DUNBAR, J.

and in a dangerous and unsafe condition; that both of the defendants knew, and by the exercise of reasonable care might have known, and that plaintiff did not know, and by the exercise of reasonable care could not have known, the fact that said wire was charged with electricity. Upon the trial of the cause, by stipulation, the street railway was dismissed from the action, and a judgment was obtained against the appellant, the Inland Telephone & Telegraph Company. From such judgment this appeal is taken.

The contention of the respondent is that it is the duty of the master to furnish the employé with a safe place to work, and with safe and suitable machinery or appliances, and that this duty is a continuing one, which is imposed upon the master during employment. There is no doubt that this proposition of law is a correct one, and it may be stated as a corollary to the proposition enunciated above, that the law charges the master with knowledge which he ought to have had; and it is settled law that he ought to know that which by the exercise of reasonable care he would have discovered. Also, it may be accepted as universally conceded law that the responsibility of the master cannot be transferred to another, and that when a duty is imposed upon him, and another is employed by him to perform that duty, the negligence of the agent will be imputed to the master. But this case must be considered with reference to another universally accepted proposition, viz., that, when a servant enters into an employment which is necessarily hazardous, he will be presumed to have assumed all the ordinary risks incident to such service; and the fact that the service is necessarily a dangerous one does not increase the master's liability if the injury resulted from the natural and ordinary incidents of the undertaking, presuming, of course, that the servant is a person of mature years and common understanding. The trouble

in this case is not so much to determine what the law is in regard to the duties of master and servant as it is to apply the law to the group of circumstances in the case. It is the insistence of the appellant that, under the circumstances of this case, there was no duty resting upon the master to inspect the insulator which was the cause of the current flowing from the trolley wire to the span wire. It may be stated here that the insulator, which was a porcelain one, broke, by reason of which the guy wire came in contact with the charged wire of the railway company, and this guy wire, being attached to the post which the respondent was climbing, was the wire with which he came in contact. We have examined with particular care both the record in this case, and the cases cited by respondent and appellant, and all other authority bearing upon the case which we have been able to find, but have not been able to find a case exactly in point, it being conceded by the authorities generally that the proper application of well-known principles governing the responsibilities of masters depends largely upon the circumstances of each case. But, from such an investigation as we have been able to make, we are forced to the conclusion that no absolute duty rested upon the master in this case to prevent the charging of this guy wire, or, in other words, to preserve inviolable the insulators, so far as the safety of the respondent is concerned. The respondent here was a lineman, and had been in the employ of the company for something over two years, working first as a groundman, and for two years or more had been working as a lineman.

It is contended by the respondent that the question of whether or not the respondent was an inspector is a question of fact, upon which the testimony is conflicting, and that, therefore, the verdict of the jury upon that proposition is binding upon the court. We think, in any event,

July, 1898.] Opinion of the Court—DUNBAR, J.

the judgment would have to be reversed by reason of the instructions given by the court; but, with the view that we take of the master's liability under the undisputed testimony, it will not be necessary to notice these errors. It is true that the respondent testified that he was not an inspector, and that he also testified, notwithstanding the fact that he had alleged in his complaint that he was a lineman, that he was not a lineman; but the testimony was evidently with reference to a definition or a statement of the lineman's duty as given by Mr. Hopkins, the superintendent of the telephone company, and the later testimony, not only of the appellant, but of the respondent and his witnesses, shows conclusively, it seems to us, that, while not nominally an inspector, the duties of a lineman embraced the duties of an inspector. Corporations of this kind act through employes. Necessarily they cannot act in any other way. An inspection of their lines and posts and insulators must be made by the employes. In this case it is an admitted fact that there was no regular inspector and no inspectors other than the linemen. It is true that some of the railroad cases cited by the respondent decided that it was the duty of the company under certain circumstances to have inspectors, but we think none of those cases are in point here. In this case the respondent and the other linemen testified that they knew that the line or wire which occupied the insulator jointly with the wire with which respondent came in contact was charged with electricity. The respondent testified that he knew the power of electricity, and the danger that would be incurred by coming in contact with a live wire; that he knew that, if the insulator broke, the result would be that the wire which he touched would be charged; and he knew also that porcelain insulators frequently did break. It seems to us that this brings him within the rule which we have

announced above—that when he accepted the employment, that was necessarily hazardous, he assumed this risk, which, under all the testimony, was an ordinary risk, and that he did not exercise the discretion which he ought to have exercised in testing this wire. The testimony shows that, shortly after the accident, one of the appellant's witnesses, Mr. Dart, observed the insulator, and separated it from the wires, and it was made an exhibit in court. He also testified that the insulator when it was exhibited was in the same condition that it was immediately after the accident, when he first discovered it. About one-half of the insulator was gone, and there was some contention developed in the trial as to whether the broken part of the insulator was towards the post which respondent climbed; and it was conceded this might have been detected by a lineman who was accustomed to looking at such things, if the broken part of the insulator had been next to the post. We think, and such was the opinion of the lower court who heard the testimony, that it is demonstrated that it was a physical impossibility for the broken part of this insulator to have been in the opposite direction from the post without making a complete insulation. This, therefore, must be considered an established fact in the case. The respondent says that he glanced at the insulator when he went to ascend the post, but did not give it any particular attention, and did not make any test. The testimony of the other linemen was—and it is not controverted—that linemen carried apparatus by which they could test insulators, and that they understood that they had to look out for themselves so far as danger was concerned. It appears from the testimony that the respondent must have known that no other inspector was kept by the company, and, even if there had been, it is impracticable for an inspector to make tests that would protect

workmen at all times. An inspector cannot be maintained at every insulator. An insulator might be tested and found sound at one hour of the day, and the next hour it might be broken, so that it would not insulate the wires, and the only way in which workmen could be protected would be to make these tests themselves; and it was testified in this case by the respondent that it would only have required a moment's time. While there is no gainsaying the rule that under ordinary circumstances the employé has the right to rely upon the fact that the master will furnish him a safe place to work and safe appliances, yet the law does not intend that this shall be a blind and unreasonable reliance, but that reasonable men shall exercise in a reasonable manner the faculties of which they are possessed. It seems to us it would only have been such reasonable exercise of prudence upon the part of the respondent in this case to have tested this wire before he touched it.

While there has been possibly some conflict in authority over cases which, in principle, were something like the case at bar, we think the great weight of authority sustains the view which we have taken. The first case cited by appellant—*Flood v. Western Union Telegraph Co.*, 131 N. Y. 603 (30 N. E. 196)—was an action for the death of the servant while working as lineman on the telegraph pole, caused by leaning his weight on one of the cross-arms, so that it broke, causing him to fall. The court there decided that the defendant's inspectors (and it seems conceded in that case that they had inspectors) were not required to climb each pole, and examine the arms; and the deceased knew this, having been employed by defendant for several years, part of the time as inspector, and the rest of the time as a lineman. The court, among other things, said:

“The linemen all discharge their duties in the daytime.

They have frequent occasion to climb the poles, and work about the arms, and obviously they are the persons who are expected to see the condition of the arms, and, if they find them insufficient, to replace them, or to report the fact."

And so in this case it was the linemen, and the linemen only, who were in the habit of climbing these poles; and under the undisputed testimony, there being no one else to inspect them, it was the duty of the linemen, before taking hold of the wire which might become dangerously charged with electricity, to test the same. So well understood are the general duties of a lineman, and the opportunities which he has for examining the poles and the instruments with which he works, that it was held in *McGorty v. Southern New England Telephone Co.*, 69 Conn. 635 (38 Atl. 359; 61 Am. St. Rep. 62), that a lineman in the employ of the telephone company could not recover for an injury caused by a fall of a pole upon which he was at work, notwithstanding a prior statement by the foreman that he had been up the pole, and that it was safe, where plaintiff knew that it was the rule and custom for each lineman to test the pole for himself, and that suitable appliances were at hand for making such test, and for securing the pole in case the lineman doubted its safety. It seems to us that the circumstances of this case are parallel with the circumstances surrounding the case at bar, although there is an attempt by respondent in his brief to distinguish them. It was true that the trial court found in that case "that it was the rule and custom, in this branch of the work, that 'each lineman should look out for his own safety in climbing poles'"; but the undisputed testimony in this case is to the same effect. *Bergin v. Telephone Co.*, 70 Conn. 54 (38 Atl. 888), was a case where a telephone company and an electric railroad

July, 1898.] Opinion of the Court—DUNBAR, J.

company used the same pole for their wires; and the court held that the law did not absolutely require the telephone company, as between it and its linemen, to inspect and test guy wires and circuit breakers put in by such railroad company, to discover whether they were in a safe condition, but whether the employer or employé should discharge such duty depended upon the circumstances of the particular case. In commenting on the testimony in that case, the court said:

“Linemen are employed by the telephone company, among other things, for the purpose of doing work which is dangerous, by reason of the possible contact of the telephone wires with highly charged wires of the street railway or other companies. The linemen are to do their own testing in such work. The telephone company has no other men than the linemen to do the testing, as the linemen knew; and there was nothing to prevent Delaney [who was the plaintiff in the case] from testing the guy wire, and the linemen on this job were furnished with all the tools, appliances and wires with which to test wires of the electric street railway company.”

This case seems to us in principle to be almost parallel with the case at bar. It is insisted by the respondent that the first case cited (*Flood v. Telegraph Co.*, *supra*) is inconsistent with the previous case in the same court (*viz.*, *Bushby v. New York, L. E. & W. R. R. Co.*, 107 N. Y. 374, 1 Am. St. Rep. 844, 14 N. E. 407), in which it was held that the defendant was liable to a brakeman on account of a wooden stake breaking because of a latent defect. We think the circumstances of this latter case were altogether different, and it was evidently considered by the court deciding the case of *Flood v. Western Union Telegraph Co.*, *supra*, that no inconsistent principles were applied in the two cases, for the former case is not overruled or mentioned in the latter opinion. *Dixon v. Western*

Union Telegraph Co., 68 Fed. 630, was a case where the plaintiff was an employé of the telegraph company, and, when engaged with others in stringing wires on its poles, was instructed to climb a pole belonging to another company, to get certain wires out of the way. While descending, after performing the work, he fell, in consequence of one of the spikes being insufficiently secured. It was held that the danger from which the accident resulted was one of the risks of plaintiff's employment, which was assumed by him, and for which his employer was not liable. That case, however, is not as strong a case in favor of the master as the case at bar, for there the plaintiff was directed by the foreman, who was at the time acting for the defendant. The court laid down the rule in that case as follows:

"The employer is not an insurer of the safety and sufficiency of the tools, machinery, or appliances furnished to the employé for his use, nor is he a guarantor of the safety of the place where or upon or about which the employé is required to work. The duty cast by law upon the employer is to use ordinary and reasonable care to furnish safe and sufficient tools, machinery, and working places. If he has done this, he has performed the full measure of his duty. The employé, in order to recover for defects in the appliances or working places of the business, must allege and prove that the appliance was defective, or the working place insecure; that the employer had notice or knowledge thereof, or that, by the exercise of ordinary and reasonable care, he might have had such notice or knowledge; and that the employé did not know of the defect, and had not equal means of knowing with the employer."

The last sentence in this proposition must be given as much force as the preceding ones; for if the employé does know of the defect, or has equal means of knowing with the employer, then, certainly, it is his unquestioned duty to investigate before proceeding. In *Griffin v. Ohio*

& *M. Ry. Co.*, 124 Ind. 326 (24 N. E. 888), the rule was announced that, "where the danger is alike open to the observation of all, both master and servant are upon an equality, and the master is not liable for an injury resulting from the dangers of the business." In this case, certainly, the danger was not only as open to the observation of the respondent as it was to the master, but the undisputed testimony shows that the master obtained his knowledge of the danger through the respondent and his fellow servant. In *Larsson v. McClure*, 95 Wis. 533 (70 N. W. 662), it was held that, "when the danger is alike open to the observation of all, both the master and the servant are upon an equality, and the master is not liable for an injury resulting from the dangers incident to the employment." In *Bedford Belt Ry. Co. v. Brown*, 142 Ind. 659 (42 N. E. 359), the court said: "Every service has its own peculiar hazards, and the law does not hold the master accountable for such hazards as ordinarily and naturally belong to any service"—and quoted approvingly *Day v. Cleveland, C. C. & St. L. Ry. Co.*, 137 Ind. 206 (36 N. E. 854), where it was said:

"In a case where the servant is one of mature age and experience, as in this case, the law never imposes the duty on the master of becoming eyes and ears for his servant, where there is nothing to prevent the servant from using his own eyes and ears to avoid danger. . . . The law requires that men shall use the senses with which nature has endowed them; and, when without excuse one fails to do so, he alone must suffer the consequences, and he is not excused where he fails to discover the danger if he made no attempt to employ the faculties nature has given him."

The rule is thus announced in *Wood, Master & Servant*, § 328:

"When a servant is employed upon work which, equally within the knowledge of the master and the servant is of a

dangerous nature, the master is not liable for the consequences of an accident occurring to the servant in the course of that employment, unless there be negligence on the part of the master, and the absence of rashness on the part of the servant. A servant is bound to exercise his own skill and judgment, so as to protect himself in the course of his employment, and the master is not regarded as warranting, generally, his safety. He is himself bound to exercise proper care, and cannot claim indemnity from the master for an injury resulting to him which might have been prevented if he had himself been reasonably vigilant."

Substantially the same principle is announced in § 366, viz.:

"A master is not liable for injuries to his servant while using machinery in the employment, if the servant has the same knowledge of its defects, or the danger incident to its use, as the master, or if in the exercise of due care, he ought to have such knowledge, and, at or before the time the accident occurred, there was nothing to indicate any danger such as demanded or suggested precautions which were omitted by the master."

In this case it was equally within the knowledge of the master and the servant that this was a dangerous employment, and it cannot be said that there was negligence on the part of the master, and absence of rashness on the part of the servant, or that the servant used his skill, to protect himself in the course of his employment. He had sufficient skill, according to the undisputed testimony, to protect himself, and he had the apparatus at hand for testing the insulator and the wires.

"If the servant is to recover damages," says Mr. Beach, in his work on Contributory Negligence (§ 299), "he, like any other plaintiff, comes into court under the legal obligation of showing, or having it sufficiently appear, that his own negligence has contributed in no legal sense to the injury."

And in § 346 of the same work it is said:

“Knowledge on the part of the employer, and ignorance on the part of the employé, are of the essence of the action; or, in other words, the master must be at fault and know of it, and the servant must be free from fault and ignorant of his master’s fault, if the action is to lie. The authorities all state the rule with these qualifications.”

There is a wilderness of authority to the same effect, but it would serve no good purpose to reproduce it here. We have examined with patience the authorities cited by the respondent, and, except in one or two cases, notably cases with reference to damages arising from the falling of posts, which we think are in conflict with the cases cited on that subject by the appellant and noticed above, they are not in point. In all of them it appeared that the injury was caused by defects or dangers which were not apparent to the servant, or which would not have been apparent to him if he had exercised ordinary care—such care as was consistent with the dangers incident to the employment. The citation from 7 Am. & Eng. Enc. Law, p. 830, to the effect that “it is the duty of a master, not only in the first instance to make reasonable efforts to supply his employés safe and suitable machinery, tools, etc., but also thereafter to make like efforts to keep such machinery, etc., in safe and serviceable condition; and to that end he must make all needed inspections and examinations,” and 2 Bailey, Master & Servant, §§ 2619, 2620, to the same effect, are, of course, accepted as the law; but we do not think that acceptance will avail the respondent in this case, for the reason, as we before intimated, that these tests were made through the linemen for this company. The same rule is announced in *Comben v. Belleville Stone Co.*, 59 N. J. Law, 226 (36 Atl. 473), cited by appellant, where it is announced that the rule is

subject to the qualification that the servant is without knowledge of the danger, and cannot observe and acquire the knowledge in the exercise of ordinary care in the employment. This qualification of the rule runs through all the cases.

The respondent alleges in his complaint that the plaintiff did not know, and by the exercise of reasonable care could not have known, the fact that said wire was charged with electricity. By this allegation he recognized the principle of law which we have just enunciated, and it was necessary for him to make this fact appear. We think, from an investigation of the whole case, that it appears from undisputed testimony that plaintiff did not exercise reasonable care in the investigation of the dangers which he knew were incident to his employment, and that had he exercised such care, and made the tests which reasonable prudence would have dictated, he would have had knowledge of the danger which beset him. The accident was unfortunate, and the result most lamentable; but, with our view of the law governing the case, the judgment must be reversed, and the cause is remanded to the lower court, with instructions to dismiss the same.

SCOTT, C. J., and GORDON, REAVIS and ANDERS, JJ.,
concur.

July, 1898.] Opinion of the Court—GORDON, J.

[No. 2952. Decided July 8, 1898.]

STATE OF WASHINGTON, *on the Relation of John Bartelt, Appellant, v. GEORGE A. LIEBES, Comptroller, et al., Respondents, AND WILLIAM MEIKLE et al., Intervenors and Appellants.*

MUNICIPAL CORPORATIONS — POWERS — CONTRACTS FOR IMPROVEMENTS
— TRUSTS.

A contract between a city and a contractor for the construction of a public improvement, providing that the contractor should not be paid until all claims for labor performed and materials furnished had been adjusted, is valid, where a city is authorized to make contracts for such improvements, with no restriction on its power to surround its contracts with reasonable regulations, and constitutes the city a trustee for the benefit of such unpaid laborers and materialmen.

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge. Reversed.

Danson & Hunske, R. L. Edmiston, E. W. Hand, and W. A. Lewis, for intervenors.

Crow & Williams, and S. R. Stern, for appellant.

A. G. Avery, for respondents.

The opinion of the court was delivered by

GORDON, J.—On the 20th of March, 1897, the city of Spokane entered into a written contract with George J. Loy for the construction of a certain sewer (which had theretofore been authorized by ordinance), the price to be paid said contractor therefor being, \$3,972, in special sewer improvement bonds, which were to be issued and delivered when the contract was completed. The contract provided that the work should be performed and the materials furnished under the provision, direction and control, and to

19	589
19	628
1W	589
122	864
19	589
133	56

the complete satisfaction, of the city engineer, and to be approved by the board of public works, and also contained the following provision:

“It is further mutually agreed and understood that no payment shall be made by the city to the contractor, George J. Loy, until said sewer shall have been completed, *and all labor paid thereon.* . . . And should any claims be filed with the comptroller by the employees of the contractor, or by the material men, before the final settlement has been had, the same shall be adjusted and satisfied before any bonds herein provided for shall be issued to said contractor.”

Said contract also contained a provision making it “subject to all the conditions and requirements of ordinance A 203, being an ordinance relating to contracts for public works, passed May 2, 1892, and as amended.” Section 16 of ordinance A 203, referred to in this contract, provides:

“Whenever the board of public works shall notify the contractor by notice personally served, or by leaving a copy thereof at the contractor’s last place of abode, that no further vouchers or estimates will be issued or payments made on the contract until the workmen and employees have been paid, and the contractor shall neglect or refuse for the space of ten days after such notice shall have been served to pay such workmen or employees, it shall and may be lawful for the city to apply any money due, or that may become due under the contract, to the payment of said workmen and employees without other or further notice to said contractor;”

The contractor completed the work, and the sewer was accepted and approved by the city. The relator, Bartelt, is the assignee of the contractor of the first \$2,000 of said bonds to be issued under the city’s contract to Loy; and in the instrument of assignment it was agreed that the bonds might be issued to the relator, instead of to the

July, 1898.] Opinion of the Court — GORDON, J.

contractor. The respondent Liebes is comptroller, and respondent Olmsted mayor, of the city. During the construction of the work the contractor incurred labor debts to the amount of \$3,000, and an indebtedness for materials furnished and used in the construction of the sewer to the amount of \$800, none of which indebtedness, either for labor or material, was paid. Written claims therefor were filed prior to August 1, 1897, in the office of the city comptroller. Authority to issue the bonds was conferred on November 15, 1897, by ordinance, and thereafter the relator duly demanded of the respondents that they issue and deliver to him \$2,000 of said bonds. This demand being refused, he instituted a proceeding in the superior court for the purpose of compelling the officers of the city to issue and deliver the same. In response to the alternative writ, defendants appeared and set up as a reason why they refused to issue the bonds the provisions in the contract between the city and Loy hereinbefore referred to; also, the facts in regard to Loy's incurring the indebtedness for which claims had been filed with the city's comptroller. After the alternative writ was issued, and before judgment, all of the appellants, except relator, obtained permission of the lower court to intervene. Their complaints set up that the several intervenors had performed work or furnished material for the contractor, Loy, in the construction of the sewer, for which labor and materials they had not been paid, and that, in conformity with the provisions of ordinance A 203, already referred to, they had filed their claims with the comptroller. They also set up that the contractor was insolvent, and asked that the city should be required to deliver to them, out of the bonds which the city had contracted to deliver to Loy, an amount sufficient to pay their respective claims. After motions to strike portions of these complaints in intervention had

been denied, and demurrers thereto overruled, the cause was set down for trial; and, at the trial, objections by the respondent city and the relator to the introduction of any evidence on behalf of the intervenors, upon the ground that their respective complaints failed to state facts sufficient to entitle them to intervene, or to any relief, were sustained, and they were dismissed from the proceeding. The trial between the relator and the city resulted in a judgment in the latter's favor; and it was adjudged that the relator was not entitled to any relief and his proceeding was dismissed. Both the relator and the intervenors have appealed. It will thus be seen that the contest is a three-cornered one, and that the appeals of the relator and the intervenors are hostile to each other.

It is the contention of the relator that the provision in the contract between Loy and the city, providing that the bonds should not be issued until the contractor had paid for all labor and material, was *ultra vires*, and that no privity of contract existed between the intervenors and the city. His position is that there was not at the time of the execution of the contract any provision of statute, or of the charter of the city, which conferred upon the board of public works, or the city, authority to insert in the contract the provision in reference to withholding payment from the contractor until the laborers and material men had been paid, and that for the same reason the provisions of the ordinance in relation to the same subject were also void. In support of this position counsel cite *Clough v. Spokane*, 7 Wash. 279 (34 Pac. 934), and *Sears v. Williams*, 9 Wash. 428 (37 Pac. 665). The first of these cases simply decided that § 2415 of the General Statutes (Bal. Code, § 5925) did not apply to street grading contracts, and that the city was not liable to laborers and material men for a failure to exact a bond contemplated

July, 1898.] Opinion of the Court—GORDON, J.

by that section. In *Sears v. Williams, supra*, the city of Anacortes had taken a bond conditioned as required by § 2415; and the action was against the sureties on the bond, to recover the value of materials furnished. The court, while conceding that the bond could be enforced in favor of the obligee—the city—held that it could not be enforced by the plaintiff, who at the time of its execution was not a party thereto, nor in any manner interested in the subject matter thereof. The decision in each of these cases received the sanction of a bare majority of the court, as then constituted, two of the judges expressly dissenting. The writer of the present opinion is constrained to say that he fully endorses the views expressed in the dissenting opinion in *Sears v. Williams, supra*, and believes that the doctrine announced by the majority is opposed to reason and the great weight of authority. *Baker v. Bryan*, 64 Iowa, 561 (21 N. W. 83); *Sample v. Hale*, 34 Neb. 220 (51 N. W. 837); *Lyman v. City of Lincoln*, 38 Neb. 794 (57 N. W. 531); *State ex rel. Palmer v. Webster*, 20 Mont. 219 (50 Pac. 558); *Knapp v. Swaney*, 56 Mich. 345 (23 N. W. 162, 56 Am. Rep. 397); *Montville v. Haughton*, 7 Conn. 543; 1 Dillon, *Municipal Corporations* (4th ed.), § 216. It is believed that the only case which at all supports it is *Breen v. Kelly*, 45 Minn. 352 (47 N. W. 1067). But it is not believed that the question that was there decided is of controlling importance, or necessarily involved, in the present case. This is not an action upon a bond taken by the city, but here the city, by its ordinance and subsequent contract became, and the relator voluntarily agreed to make the city, a trustee for the benefit of all persons who should perform labor or furnish material in the construction of the improvements ordered by the city authorities. All that the intervenors are seeking in the present proceeding is to have that trust

which was created for their benefit enforced. The city, while not legally bound to do so, was nevertheless charged with the moral duty of protecting the men who labored upon, or furnished materials for, its public improvements; and the right to require its contractor to pay for the labor and material expended in its behalf, although not prescribed by any positive law, belonged to the city as an incident to its power to contract for the improvement. *United States v. Tingey*, 5 Pet. 115; *United States v. Bradley*, 10 Pet. 343. The plea of *ultra vires* should not, as a general rule, prevail when it would not advance justice, but would accomplish a legal wrong. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62 (20 Am. Rep. 504).

Relator's counsel, in further support of their position, cite the case of *State ex rel. Fairhaven Land Co. v. Cheetham*, 17 Wash. 131 (49 Pac. 227). In that case the legislature had appropriated a specific sum for a specific purpose, viz., the erection of a school building by a board which possessed none of the powers common to municipal bodies. All that was decided was that the board could not, by the insertion of a clause in the contract for the erection of the school building, relative to the claims of third persons, establish any liability against the fund so created by the legislature. There was nothing in the act providing for the appointment of the board, or creating the fund, which expressly or by implication conferred any power on it to create itself a trustee for any purpose not named in the act; and its whole authority was special and limited. It was created for a single purpose and entrusted with a single duty, the performance of which terminated at once its functions and its existence.

In the present case the work has been performed agreeably to contract, and the city has accepted the work and gone into possession. It is not pretended that it has not suf-

July, 1898.] Opinion of the Court—REAVIS, J.

ficient funds to pay all of the claims for labor and material; it is not pretended that that is not exactly what, by its ordinance and contract, it agreed and undertook to do; and we are unable to perceive any reason in law or morals why its undertaking in this regard cannot be enforced. The enforcement of this trust, so voluntarily undertaken, entails no hardship upon the city, or upon any one. But counsel say there is no provision of statute or charter which expressly authorizes it. We reply that there is no provision which prohibits it, and inasmuch as the law has expressly conferred upon the city the power to make this improvement by contract, and has not limited or prescribed the mode in which it should be exercised, it seems to us to follow, as an incident of the power thus expressly granted, that the city may hedge its contract about with such stipulations and safeguards not inconsistent with the exercise of the right expressly conferred, as will best enable it to execute the power or enjoy the right which is expressly conferred. Suppose we concede that there is no legal duty or moral obligation upon the city to see that the laborers who work for its contractors are paid. It may nevertheless be to the best interests of the city to have the payment of laborers and material men secured. In the first place, the certainty of securing their pay might induce them to work for a less wage, or furnish materials at a smaller cost, than if their pay was uncertain and they were obliged to look solely to a contractor whose honesty or solvency might be doubted. And the credit which such security gives the contractor might well be presumed to enable him to prosecute the work with diligence, and less danger of strikes or difficulty with his workmen. Public inconvenience and delays in public improvements, are not infrequently occasioned by the failure of employees and laborers to secure prompt payment or adjustment of their

claims. By avoiding such complications, and making it certain that the laborer will receive his pay, it is to be presumed that the city is enabled to make a better contract and get its improvement constructed at less expense and in less time than would otherwise be possible.

For the disposition of the present case, it is enough that the legislature, in the first instance, conferred upon the city authorities the general power to make certain public improvements by contract, which carried with it, as an incident, the power to insert in such contracts reasonable regulations and provisions in furtherance of public convenience; and such is the character of the provisions in the contract under consideration. The city has and holds the entire contract price for which this work was undertaken and completed. Its sole justification and authority for withholding it from the contractor is that it is needed for the discharge of these labor claims. And it seems to us that the city assumes an inconsistent position when it asserts its right to withhold the money from the laborers, while insisting that the contractor is not entitled to it, and all the time using and enjoying the benefit of the improvement.

We think the court erred in holding, in effect, that the complaints in intervention were not sufficient to entitle the intervenors to relief; and the judgment must be reversed, and the cause remanded for further proceedings in conformity with this opinion. The intervenors only will recover costs.

SCOTT, C. J., and DUNBAR and REAVIS, JJ., concur.

ANDERS, J., concurs in the result.

July, 1898.]

Opinion Per Curiam.

[No. 2933. Decided July 7, 1898.]

JOHN C. CARTER, *Respondent*, v. CITY OF SEATTLE,
Appellant.

ACTION FOR PERSONAL INJURIES—PLEADING AND PROOF—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action to recover for personal injuries alleged to have been caused by defendant's negligence, where evidence of plaintiff's intoxication at the time of the injury has been admitted, the plaintiff, cannot, in order to rebut such evidence, prove his general reputation for sobriety.

In a negligence case, in which defendant pleads a general denial, and also plaintiff's contributory negligence, and there is no motion to make the answer more specific, evidence of plaintiff's intoxication, as the cause of the injury received by him, is admissible.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Reversed.

John K. Brown, for appellant.

John E. Humphries, *W. E. Humphrey*, and *E. P. Edsen*, for respondent.

Per Curiam.—Plaintiff sued to recover damages for injuries sustained by falling from a sidewalk into a hole in an alley at a point where said alley joined the street. From the judgment in his favor based upon the verdict of the jury, the city has appealed. At the trial of the cause, evidence was given which tended to show that the plaintiff was intoxicated at the time of receiving the injury. In rebuttal, plaintiff testified that he had not been drinking on the evening of the accident, and also introduced three witnesses, who were permitted over the objection of the appellant, to testify to his "general reputation and character for sobriety." The admission of this latter testimony

constitutes the principal ground urged for a reversal. We think the court erred in permitting evidence to be given as to plaintiff's general reputation for sobriety. The effect of such evidence was to raise a collateral question, to draw the attention of the jury from the issue they were called upon to try, and to engross their minds with a question wholly immaterial. *Williams v. Edmunds*, 75 Mich. 92 (42 N. W. 534); *Carr v. West End St. Ry. Co.*, 163 Mass. 360 (40 N. E. 185), and cases there cited. The case of *Gulf, C. & S. F. Ry. Co. v. Gross*, 21 S. W. 186 is cited and strongly relied on by the respondent; but, as we understand that case, it does not support his position. In that case the defendant claimed that the injury resulted from plaintiff's being so drunk as to stagger off the depot platform. To offset the evidence in support of such claim, plaintiff was permitted to call witnesses acquainted with his habits and conduct, to testify what effect, if any, imbibing intoxicating drinks had on him. It seems to have been conceded that the plaintiff in that case was in liquor, and the question to which the evidence was directed was *what effect* imbibing liquor had upon him. The general and well settled rule in negligence cases is that it is not proper for a plaintiff, in order to rebut evidence of particular acts of negligence, to show that he is generally careful, cautious and prudent; nor can it be shown that a party is habitually careless to support a claim of negligence upon a particular occasion. The principle underlying these cases and the case at bar is that such evidence raises a collateral issue not affecting the question to be determined. *Fahey v. Crotty*, 63 Mich. 383 (29 N. W. 876); 6 Am. St. Rep. 305; *City of Junction City v. Blades*, 1 Kan. App. 85 (41 Pac. 677); *Adams v. Chicago, M. & St. P. Ry. Co.*, 93 Iowa, 565 (61 N. W. 1059); *Illinois Central R. R. Co. v. Borders*, 61 Ill. App. 55; *Wooster v. Broad-*

July, 1898.]

Syllabus.

way & S. A. R. R. Co., 72 Hun, 197 (25 N. Y. Supp. 378).

Respondent claims that there was no issue as to intoxication, and urges that all testimony as to intoxication was immaterial. We think this position is not well taken. In addition to a general denial, the answer alleged contributory negligence. There was no motion to make the answer more specific, and the evidence as to intoxication was received at the trial without any objection. For either of these reasons, the objection now urged by respondent comes too late.

For the error above noticed the judgment must be reversed, and the cause remanded for a new trial.

[No. 2509. Decided July 12, 1898.]

L. E. GREGORY, *Respondent*, v. U. K. LOOSE, *Appellant*.

19	599
40	237

PRINCIPAL AND AGENT—IMPLIED AGENCY—EVIDENCE—HEARSAY.

The building of a logging road is not within the scope of authority delegated to an agent, who has been authorized to operate a shingle mill, contract for shingle bolts and conduct preliminary negotiations for rights of way and for the purchase of timber.

Declarations of one assuming to be an agent as to what his principal said or concluded to do respecting a matter in controversy are inadmissible on the ground of being hearsay evidence.

The acts and declarations of an agent are not competent evidence in proof of agency.

Appeal from Superior Court, Snohomish County.—Hon. JOHN C. DENNEY, Judge. Reversed.

Bell & Austin, for appellant.

Headlee & Allen, and *J. B. Ault*, for respondent.

The opinion of the court was delivered by

ANDERS, J.—On and prior to February 5, 1895, the Riverside Shingle Company was the owner of a shingle mill at Machias, in Snohomish county, and on or about that day it conveyed all of its property, including the shingle mill, to the Snohomish National Bank, in payment of its indebtedness to the bank. The mill was thereafter known and designated as the Riverside Shingle Mill. Soon after the transfer, the bank started up the mill, under the general supervision of appellant Loose, who was the bank's cashier, and proceeded to manufacture shingles from bolts furnished by other parties having them for sale. One R. P. Mathews was employed to operate the mill, with authority to contract for and estimate shingle bolts, subject to the approval of the appellant. In September or October, 1895, said Mathews employed one C. R. Gregory to construct a logging road to some timber which appellant had contracted for, and which was to be cut either by appellant, or his vendors, and removed within five years from the date of the contract, which contract was in writing. Said Gregory, by the direction or consent of Mathews, employed the respondent and several other persons to labor on the road. As superintendent of construction, said Gregory kept the time of the men employed, and on or about October 25, 1895, demanded from Mr. Loose the amount alleged to be due them respectively for their labor. Payment was refused on the ground that the making of the road had not been authorized by appellant, and that neither appellant nor the bank had any knowledge that it was being constructed. This action was thereupon instituted to recover the amount claimed to be due respondent and others, whose claims were assigned to him, for labor performed in the construction of the road.

It is not claimed that either the respondent, or any of

July, 1898.] Opinion of the Court—ANDERS, J.

his assignors, was personally requested or authorized by Mr. Loose to perform the labor for the value of which this action is waged, but the contention is that Mathews was appellant's agent to construct the road and, as such agent, was authorized to bind appellant for the payment for the labor performed thereon. And it cannot reasonably be claimed that Mathews's act in authorizing Mr. Gregory to construct the road was ratified by the appellant, for we discover no evidence of such ratification in the record. If, therefore, Mathews was the agent of appellant for the purpose claimed, it was either because appellant held him out to the public as such agent, or because what he did in that regard was within the authority which appellant had actually given him, or within the apparent authority which he knowingly and without dissent permitted him to assume. 1 Am. & Eng. Enc. Law (2d ed.), pp. 988, 989.

The actual authority, as we have said, which was delegated to Mathews, was authority to operate the Riverside Shingle Mill and to contract for shingle bolts and estimate the value thereof, subject to the approval of appellant. The bolts were paid for, in every instance, by appellant at the bank and generally, if not always, by checks signed, "Riverside Shingle Mill, U. K. Loose, Agent." During Mathews' employment at the mill, he sometimes gave orders on merchants for the delivery of limited quantities of groceries or other merchandise to men who were furnishing shingle bolts or working in the mill. The amount of the respective orders was reported to appellant by Mathews, and was generally deducted from the sum due to the person who received the goods and paid to the drawee, although it appears that, in several instances, such payment was refused.

Respondent introduced evidence at the trial to the effect that Mathews negotiated a contract for timber for appel-

lant with certain designated persons, but the contract was finally executed by appellant himself and contained no provision whatever for the building of a logging road; and this, too, notwithstanding the fact that the witness C. R. Gregory testified that Mathews, when negotiating for the timber, said to the vendors thereof, who were insisting that a road should be constructed to it, "We will make the contract with this in, and we will build that road immediately." This is the contract which we mentioned above as providing for the removal of the timber purchased within five years. Evidence was also introduced by respondent to the effect that Mathews made an arrangement with one Eddy for a right of way over his land for a logging road in favor of appellant, and located the same; but, like the timber contract, this contract, which was a lease for a term of five years, was executed by appellant himself—one Packard, as well as said Eddy, being a lessor.

The first and principal question to be determined is, do the facts above set forth, singly or together, warrant the finding that Mathews had the power to bind the appellant by the act of authorizing the building of the road in question? And we are of the opinion that this question must be answered in the negative, for no such power can legitimately be deduced from the facts appearing in the record. It is true that an agency to do a particular thing may be implied from the habits and general course of dealing between the parties, but, in this instance, nothing of the kind could be shown, as no logging road had ever been constructed or authorized by the appellant. It is also true that the authority to act as an agent in a particular business or transaction may often be implied from acts done in the course of the agent's employment in some other business.

"But it is not to be inferred, however, that authority is, in any case, to be implied without reason, or presumed

July, 1898.] Opinion of the Court—ANDERS, J.

without cause. The implication must be based upon facts, and cannot arise from any mere argument as to the convenience, utility or propriety of its existence. So, too, the facts from which it is sought to be implied are to be given their natural, legal and legitimate effect, and this effect is not to be expanded or diminished in order to establish or overthrow the agency." Mechem, Agency, § 85. See, also, Story on Agency, § 87; *McAlpin v. Cassidy*, 17 Tex. 449.

But it is well settled in the law of agency that the extent of implied authority is limited to acts of a *like kind* with those from which it is implied, and that an implied power is never extended by construction beyond the obvious purpose for which it is granted. 1 Am. & Eng. Enc. Law (2d ed.) p. 1002; Mechem, Agency, §§ 85, 274, 312; Story, Agency, § 87; *McAlpin v. Cassidy*, *supra*; *Graves v. Horton*, 38 Minn. 66 (35 N. W. 588).

Applying these principles, it seems plain to us that the building of a logging road was not within the scope of the authority, real or apparent, delegated to Mathews; for it is an act of an entirely different kind from that of operating a shingle mill, contracting for shingle bolts, or conducting preliminary negotiations for a right of way, or the purchase of a quantity of timber. In our judgment, if it can be inferred from the facts in this case that he was authorized to build the road in question, it might, with equal propriety, be inferred that he was authorized to construct a railroad at the expense of the appellant, for the one is as foreign to his employment as the other. It was the duty of Mr. Gregory to ascertain the extent of Mr. Mathews' authority before engaging in this undertaking, and he had no reasonable excuse for not ascertaining it. *Hurley v. Watson*, 68 Mich. 531 (36 N. W. 726).

He could have ascertained the fact by simply asking a question, but, instead of doing so, he relied upon the acts

and representations of the assumed agent; and he admitted in his testimony, in effect, that in so doing he acted unreasonably and, in fact, foolishly. The testimony also shows that he himself had previously advised the appellant not to build a road at that time of the year. Giving due weight to all the material evidence in the record, it seems clear to us that there was not sufficient evidence to justify a verdict in favor of the respondent, and the learned trial court therefore erred in not taking the case from the jury, at appellant's request.

It was also error, we think, to permit certain witnesses to testify as to what this supposed agent told them that appellant said or had concluded to do, with respect to this logging road. This was clearly hearsay testimony, and hence not admissible. Nor were the acts and declarations of Mathews competent evidence in proof of agency. *Comegys v. American Lumber Co.*, 8 Wash. 661 (36 Pac. 1087).

Certain portions of the charge of the court to the jury are objected to by appellant, but we perceive no substantial error therein, except in the application of the general principles of law announced to the facts of the case; but it is unnecessary to enter upon a discussion of the several objections raised, as the judgment must be reversed for reasons already indicated.

Reversed and remanded for further proceedings.

SCOTT, C. J., and GORDON and REAVIS, JJ., concur.

DUNBAR, J., dissents.

July, 1898.]

Opinion of the Court — REAVIS, J.

[No. 2770. Decided July 12, 1898.]

MILES C. MOORE *et al.*, *Executors, Respondents*, v.
WILLIAM H. KIRKMAN *et al.*, *Appellants*.

EXECUTORS — ADMINISTRATION OUT OF COURT — PRESENTATION OF
CLAIMS.

19	605
21	194
21	578
19	605
26	104
19	605
29	485

Where a testator has disposed of his estate by vesting his executors with full authority to administer same without the intervention of the probate court, notice to creditors is not necessary; and hence failure to present a claim within one year after publication of notice to creditors will not operate to bar action thereon.

Appeal from Superior Court, Walla Walla County.—
Hon. THOMAS H. BRENTS, Judge. Affirmed.

Thomas & Dovell, for appellants.

William H. Upton, and *B. L. & J. L. Sharpstein*, for respondents.

The opinion of the court was delivered by

REAVIS, J.—Respondents are executors of the will of Dorsey S. Baker, deceased. On January 19, 1892, William Kirkman, with another, executed his promissory note for \$2,500 to respondents, as executors, and on April 25, 1893, he died, a resident of Walla Walla county, leaving estate therein, and his last will and testament disposing of his estate and appointing appellants as executors.

The will contained, among others, the following provisions:

“I do hereby expressly provide and direct that no bond or other security be required of said executors or any of them in the execution of their said trust, and that, so far as by law in any case can be done, they be relieved from

the supervision and interference and control of all courts, answering only to the tribunal of their own consciences for fidelity in their said office."

Provision is also made in the will that the executors take, hold and be seized and possessed of and vested with the title to the entire estate, for the purpose of carrying into effect the will according to the spirit and meaning thereof, and that the executors act by a majority, and that all contracts, deeds, mortgages, conveyances, bonds and other transactions in any way pertaining to the estate be as valid and binding as if the testator himself had been living and executed the same, and that in the discretion of the executors they should continue any traffic, business, enterprise, or use in which they found any part of the estate on coming into possession of it, or that they use or employ the estate, or the proceeds of it, in any other business they might regard for its best interests, and that generally the executors are authorized and directed to manage, control and dispose of the estate as a prudent owner and manager should do.

The executors of Kirkman, deceased, on the 27th of May, 1893, published notice to creditors of the estate to present their claims against the deceased, duly verified, with necessary vouchers, mentioning their office in the city of Walla Walla, within one year from the date of the notice. The notice was dated May 23, 1893. It was duly published and an affidavit of the publication thereof made. The will was presented for probate and duly proved and established in the probate department of the superior court. No order was made by the court providing for notice to creditors. On the 23d of November, 1895, the respondents presented the claim to appellants, as executors of the estate of Kirkman, deceased, founded upon the promissory note above mentioned. The claim was rejected by appel-

July, 1898.] Opinion of the Court—REAVIS, J.

lants. On the 15th of January, 1896, the respondents commenced this action to recover judgment on the note.

The appellants answered and set up the publication of the notice to creditors and alleged that the claim of respondents was barred because not presented within one year after the publication of the notice. At the trial the plaintiffs put in evidence the promissory note, and proved its presentation to appellants and their rejection. Defendants moved for a non-suit for the reason that it was not shown that the claim was presented within the time or at the place specified in the notice to creditors published, which was overruled. Defendants then offered in evidence the notice to creditors, with the affidavit of publication. Plaintiffs objected to its reception on the ground that it was incompetent, irrelevant and immaterial, and not a notice authorized by law, and that publication was not authorized by the court. The court sustained the objection to the introduction of the testimony. The jury was dismissed from the consideration of the cause, the facts stipulated by the parties and found by the court as above stated.

Some questions have been made upon the form and date of the notice given to creditors by appellants, as executors of Kirkman, deceased; but the controlling question, in our view, is whether appellants, having undertaken to settle the estate without the intervention of the probate court, could give notice to creditors under the probate procedure provided in our statutes, which would limit the presentation of claims to one year from publication of the notice. Section 955, 2 Hill's Code, provides, among other things as follows:

“In all cases where it is provided in the last will and testament of the deceased that the estate shall be settled in a manner provided in such last will and testament, and that letters testamentary or of administration shall not be required, it shall not be necessary to take out letters testa-

mentary or of administration, except to admit to probate such will in the manner required by existing laws; and after the probate of such will, all such estates may be managed and settled without the intervention of the court, if the said last will and testament so provides.”

In *Newport v. Newport*, 5 Wash. 114 (31 Pac. 428), this section was before the court, and it was there observed:

“The provisions of the above statute are plain and explicit, and we see no reason why full force and effect should not be given to it, in all cases coming clearly within its terms. The Revised Statutes of Texas of 1888 (art. 1942) contain a provision quite similar to our statute, and which the supreme court of that state, in several decisions . . . have construed and upheld. In *Lumpkin v. Smith*, 62 Tex. 251, it was held that, where a will is made under the statute, and the executor has qualified as therein required, the estate is withdrawn from the jurisdiction and control of the county court. . . . In this case we have no doubt that the respondents can do anything which an ordinary executor could do in honestly administering the testator’s estate, free from the control or supervision of the superior court. Their power is derived from the will, and their duty prescribed by it, and, so long as they faithfully comply with its provisions, their acts cannot be called in question.”

Again, in *Smith v. Smith*, 15 Wash. 239 (46 Pac. 249) it was held, where trustees of the property of an estate, instead of executors, have been appointed by a will, the probate court has no jurisdiction of questions involving their management of the estate, but the same are cognizable in equity. *Pleasants v. Davidson*, 34 Tex. 459; *Reynolds v. McFadden*, 36 Tex. 129; *Durfee v. Abbott*, 50 Mich. 278 (15 N. W. 454); *Durfee v. Abbott*, 50 Mich. 479 (15 N. W. 559).

Sections 977 and 979, 2 Hill’s Code (Bal. Code, §§ 6226, 6228), do not necessarily apply to estates settled without the intervention of the court. They were adopted as early

July, 1898.] Opinion of the Court—REAVIS, J.

as 1855 (Laws 1855, p. 266), and § 955, *supra*, was enacted in 1868 (Laws 1868, p. 49). Section 955 was evidently intended to authorize one while living, and when competent, to provide for the management, disposition and distribution of his property after death, without administration in the probate court; and it cannot be said that administration is absolutely necessary for all estates. Frequently the management of a competent trustee may be much more beneficial to the interests of minor heirs and legatees than an administrator under the supervision of the probate court; and the interest of creditors equally protected. When creditors are paid, they have no further concern as to the management or disposition of the estate. In regular administrations the administrator must require the verification of each claim against the estate, with vouchers accompanying the same. He cannot dispense with this because such claims, with the evidence of their validity, must be submitted to the approval and judgment of the probate court. In the case of trustees or executors fully empowered to pay the debts and dispose of the property in their discretion, they may, without the formality of a presentation or vouchers, pay the debts; and, while a published notice is proper and may be convenient, it does not bind creditors. They are responsible for the faithful discharge of their trust. By the terms of the will before us they were to conduct the business of the estate of the deceased and pay the debts, as he himself would have done. There seems to be no question of inadequacy of assets to meet the demands of creditors arising here. If the testator has chosen to dispose of his estate without the intervention of the probate court, the procedure controlling the administration in probate is not applicable, and the notice to creditors published by appellants as executors was without any legal effect. Therefore, the note in suit was not

barred for failure to present the claim within one year from the date of the publication of the notice.

This view disposes of the cause. The judgment of the superior court is affirmed.

DUNBAR, GORDON and ANDERS, JJ., concur.

[No. 2788. Decided July 12, 1898.]

A. R. COLEMAN, *Respondent*, v. J. B. MONTGOMERY,
Appellant.

APPEAL—OBJECTIONS TO EVIDENCE—INDEFINITENESS.

When the objections to the introduction of evidence are not definite enough to call the court's attention to the real ground of its inadmissibility, the error cannot be urged on appeal.

Appeal from Superior Court, Jefferson County.—Hon. JAMES G. McCLINTON, Judge. Affirmed.

Robert W. Jennings, and *Harry Ballinger* (*Stott, Boise & Stout*, of counsel), for appellant.

Trumbull & Trumbull, and *A. R. Coleman*, for respondent.

PER CURIAM.—Respondent brought this action to recover for legal services rendered under a contract alleged to have been entered into with the attorney in fact and agent of the appellant. The case was tried to a jury and from a judgment in plaintiff's favor the defendant has appealed. The errors assigned relate to rulings of the court during the course of the trial. The principal ground of alleged error relied upon was the admission, over respondent's objection, of what purported to be a copy of a power of attorney executed by the appellant, and of record in the office

19	610
27	175
19	610
32	182
19	610
34	380
34	624

July, 1898.] Opinion of the Court—ANDERS, J.

of the recorder of conveyances of Multnomah county, Oregon, by whom it purports to have been certified. This was received in evidence without any proof concerning the laws of that state on the subject, but the objection to this evidence was not sufficiently definite to raise the grounds urged here. The objection was evidently considered by the court as going only to the form of the certification. This is emphasized by the question which the court addressed to counsel.

There was competent evidence tending to support the verdict, and the judgment entered upon it must be affirmed.

[No. 2560. Decided July 14, 1898.]

VERMONT LOAN AND TRUST COMPANY, *Appellant*, v.
JOSEPH G. GREER *et al.*, *Respondents*.

FORECLOSURE OF MORTGAGES—ATTORNEY'S FEE.

Under Code Proc., § 803 (Bal. Code, §5166), which provides that in all judgments on promissory notes, whether secured by mortgage or not, an attorney's fee may be allowed in any amount specially contracted, the court has no power, upon rendering a decree of foreclosure, to fix the attorney's fee in any other amount than that contracted for.

Appeal from Superior Court, Whitman County.—Hon. WILLIAM McDONALD, Judge. Reversed.

A. E. Gallagher, and Crow & Williams, for appellant.

The opinion of the court was delivered by

ANDERS, J.—This action was brought by appellant to foreclose a mortgage on certain real property in Whitman county, executed by the respondents, Joseph G. Greer and

Lorette S. Greer, to secure the payment of their promissory note for \$2,800 and interest. None of the defendants appeared in the action, and the default of each of them was regularly entered. The court found the facts for the plaintiff as alleged in the complaint. It was alleged, among other things, that the mortgage provided that the mortgagors would pay the sum of \$300 as attorney's fees in case suit was instituted to foreclose the mortgage. The sum due on the mortgage, including principal and interest, was found by the court to be \$3,004.40; but the court refused to include in the judgment the \$300 attorney's fee, and, notwithstanding the objection of appellant, allowed and included therein, as such fee, the sum of \$100 only, on the ground that the amount stipulated for was unjust and unconscionable. From this ruling of the court this appeal was taken. The appellant bases its claim for the full amount of the attorney's fee contracted for in the mortgage upon § 803 of the Code of Procedure (Bal. Code, § 5166), which reads as follows :

"In all judgments on promissory notes, and similar instruments in writing, whether secured by mortgage or not, an attorney's fee may be allowed when specially contracted to be paid by the terms of the note or mortgage in any amount so specially contracted."

And it would seem obvious from the language employed that it was not the intention of the legislature to confer discretionary power upon the courts to alter or modify contracts for attorney's fees embodied in notes or mortgages, or to allow or disallow such fees upon their own motion merely, but, on the contrary, to prevent the exercise of such power. This statute says an attorney's fee may be allowed "in any amount so specially contracted"—not in any amount deemed by the court more reasonable. This court has always considered this section as mandatory, and any

July, 1898.] Opinion of the Court — ANDERS, J.

other construction would deprive it of all force and effect, and would render it entirely nugatory, if not meaningless. Indeed, if the words "in any amount so specially contracted" were eliminated, we would still be obliged, under the well settled rule of construction, to hold the provision peremptory.

"Permissive words in respect to courts or officers are imperative in those cases in which the public or individuals have a right that the power so conferred be exercised." Sutherland, Statutory Construction, § 462.

See, also, Black, Interpretation of Laws, pp. 155, 166; *Supervisors v. United States*, 4 Wall. 435.

Here it is plain that appellant has a right that the power conferred by this statute be exercised in its favor. But we have so often construed this section adversely to the ruling of the court below that nothing further need be said upon the question. The point here presented was expressly passed upon by us in *Haywood v. Miller*, 14 Wash. 660 (45 Pac. 307), and the question was considered in the following cases, also: *Watson v. Sawyer*, 12 Wash. 35 (40 Pac. 413); *Ames v. Bigelow*, 15 Wash. 532 (46 Pac. 1046); *Poncin v. Furth*, 15 Wash. 201 (46 Pac. 241); *Exchange National Bank v. Wolverton*, 11 Wash. 108 (39 Pac. 248). It may properly be observed, however, that in the absence of a statute like ours, the courts have almost universally held that a contract in a mortgage for a reasonable attorney's fee will be enforced; and the general rule is, that the court will consider the amount stipulated for by the parties to be reasonable, unless it is extravagantly large and extortionate, which cannot reasonably be said to be the case in this instance. Wiltsie, Mortgage Foreclosures, p. 952, § 866; 2 Jones, Mortgages (5th ed.), § 1606.

The cause will be remanded with instructions to include \$300 as attorney's fees in the judgment; but, as the re-

spondents were not instrumental in causing the expense of this appeal, it would be unjust to tax the costs against them, and the appellant will not recover the same.

SCOTT, C. J., and REAVIS, GORDON and DUNBAR, JJ., concur.

[No. 2863. Decided July 19, 1898.]

JOHN H. GRIFFITH *et al.*, Appellants, v. JAMES MAXWELL, Respondent.

JUDGMENT—EX PARTE MODIFICATION.

The vacating of a judgment on the pleadings, on defendant's motion for a new trial, and entering judgment for a less sum, in the absence of plaintiffs, is prejudicial error, when the pleadings are so vague and confusing that it is difficult to determine exactly what the issue is. (GORDON, J., dissents.)

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge. Reversed.

W. A. Lewis, for appellants.

Crow & Williams, for respondent.

The opinion of the court was delivered by

REAVIS, J.—The motions to dismiss the appeal and strike the statement of facts are denied. Appellants, who are plaintiffs, commenced an action in the superior court praying for judgment against defendant for \$550.88, the remainder alleged to be due on account. Both plaintiffs and the defendant were engaged in the plumbing and heating business, and had sundry transactions between themselves, furnishing goods to each other, and from time to time comparing accounts. Defendant made answer to the com-

19	614
222	635
19	614
225	659

July, 1898.]

Opinion of the Court — BEAVIS, J.

plaint, and admitted an indebtedness of \$274.36. Plaintiffs replied at length, and the pleadings upon which the action was finally heard are vague and confusing, and this court will not now endeavor to determine precisely what they mean. At the trial the plaintiffs merely introduced in evidence the original answer and rested. The defendant then moved for a non-suit as to any other amount than the sum admitted (\$274.36), and also moved for an instruction that the jury find a verdict for the plaintiffs for the amount admitted to be due from defendant, which was refused, and defendant excepted. The plaintiffs then moved the court to decide as a matter of law what verdict should be found, and discharge the jury from further consideration of the case, which motion the court granted, to which defendant excepted. On the 24th of June, 1897, the court announced its decision, and rendered judgment for the plaintiffs for \$550.88, as prayed for in the complaint, to which defendant excepted, and duly filed a motion for a new trial. On the 6th of July the court granted a new trial, when the plaintiffs were not present in person or by attorney, and vacated the judgment, and immediately entered judgment in favor of plaintiffs for the sum confessed by defendant, \$274.36. From this final judgment plaintiffs have appealed.

The only question we deem it proper to consider is the vacation of the judgment upon the motion for a new trial and the entering of judgment subsequently without a trial. It is maintained by counsel for respondent that the correct judgment was entered, and that the final judgment may be considered in the nature of a modification or correction of the first judgment; that is, that if the pleadings show that the correct judgment was entered, it ought not now to be disturbed. But, as has been observed, the issues of fact made by the pleadings are misty and the haze that sur-

rounds them here may have to some extent been cleared away by facts appearing in the superior court, and in the atmosphere surrounding the case, which is not brought here. The statement of facts certified shows a regular motion for a new trial made by defendant, with a number of grounds on which the motion was based, and shows that this motion was granted, and also shows that the vacation of the former judgment was made, and a new judgment entered, in the absence of plaintiffs; that is, without a hearing. Upon the exhibition of this record, we conclude that the cause should be reversed; and it is so ordered.

DUNBAR and ANDERS, JJ., concur.

GORDON, J.—I dissent. I think the judgment was only what it should have been under the pleadings, and, if anything occurred in the lower court not shown by the record, it should be presumed to have conduced to the judgment rather than otherwise. If the judgment was right, the fact that it was entered in appellants' absence would be, at most, harmless error, not warranting a reversal.

[No. 2747. Decided July 20, 1898.]

RHODE ISLAND MORTGAGE AND TRUST COMPANY, *Respondent*, v. CITY OF SPOKANE, *Appellant*.

APPEALABLE ORDER—DEFAULT JUDGMENT—ASSIGNMENTS OF ERROR—
MUNICIPAL CORPORATIONS—LIABILITY UPON SPECIAL FUND WARRANTS

A judgment by default is a final judgment, and appealable, since, under Code Proc., § 193 (Bal. Code, § 4911), objection can be made to the complaint on appeal, if it fails to state facts sufficient to constitute a cause of action.

Where the only question sought to be raised by appellant is upon the sufficiency of the complaint to sustain the judgment,

19 616
21 574

19 616
33 404

July, 1898.] Opinion of the Court—REAVIS, J.

the allegation set forth in his brief that the complaint does not state a cause of action constitutes a sufficient assignment of error.

A city does not render itself liable out of its general fund for the payment of street improvement warrants drawn on a special fund, through its failure to provide such special fund. (DUNBAR, J., dissents.)

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge. Reversed.

A. G. Avery, for appellant.

Blake & Post, for respondent.

The opinion of the court was delivered by

REAVIS, J.—Respondent commenced suit against the city of Spokane, appellant, to recover judgment for the amount of numerous street grade warrants transferred to respondent by the contractor who did the grading and other work for which the warrants were issued. The complaint alleges the cause of action, in substance, on each warrant, as follows: That as part payment for the grading of Adams street (Third district), in the city of Spokane, the city made, executed, and delivered, in pursuance of a contract so to do, to one Clark, certain warrants of said city (numbering and dating them respectively, and stating the amount), said warrants being made payable to said Clark or bearer, out of Adams street (Third district) grade fund; that each of the warrants was presented to the treasurer of the city on the 17th of September, 1892, for payment, but payment was refused, and the treasurer indorsed the same, "Not paid for want of funds;" that the warrants were made and delivered by the city as part payment for the contract for the grading, curbing, and guttering of Adams street, in the city, as part payment for work and labor done and performed in pursuance of and in conformity to said contract made and entered into by the city with

said Clark for the improvement of said street; that the city has wholly failed and neglected to make or levy any assessment or tax upon the property benefited by the work and labor done upon the street and has failed to provide any street grade fund whatever for the payment of said warrants, or any part thereof, and has not now, and never has had, any fund set aside or created for the payment of the warrants or any portion thereof, and has never at any time created or levied any valid or any assessment or tax for the payment of the warrants, and that the city has exhausted its power and authority to make and levy any local or special assessment or create such fund, and has no power or authority so to do; that respondent demanded payment for each of the warrants out of the general fund of the city, or any fund liable for payment thereof, and the city had refused to pay the warrants or any part thereof, to the plaintiff's damage in the amount specified in the warrants. Default was made by the city, and, for failure to answer, judgment was entered in favor of the respondent, according to the prayer of the complaint. The city of Spokane has appealed from such judgment.

1. Respondent has moved to dismiss the appeal, on the ground that no appeal lies from a judgment entered by default in the superior court. Our statute (2 Hill's Code, § 193, Bal. Code, § 4911) provides:

"If no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting always the objection that the court has no jurisdiction or that the complaint does not state facts sufficient to constitute a cause of action, which objection can be made at any stage of the proceedings, either in the superior court or supreme court."

The California act relating to appeals is substantially the same as ours; and in *Hallock v. Jaudin*, 34 Cal. 167,

plaintiffs had judgment by default in the lower court upon a complaint on a promissory note, and defendants appealed. A motion was made to dismiss the appeal, because it was from a judgment by default. The court observed:

“As to the right of appeal, there is no distinction between judgments by default and judgments after issue joined and a trial. The former is as much a final judgment as the latter, and the statute gives a right to appeal from all final judgments without distinction. From this it follows that all errors disclosed by the record can be reviewed and corrected on an appeal from the former class of judgments as well as the latter. This is too plain for argument, and we do not hesitate to declare that all cases which are to the contrary are unsupported by any provision of the law by which the jurisdiction and practice of this court is regulated. To hold otherwise would be to create a distinction where the law has not, which we have no power to do.”

And it is uniformly held in California that a judgment by default is a final judgment, and appealable. *Harmon v. Ashmead*, 60 Cal. 441, 442, and cases cited. The same rule is stated by Mr. Freeman, in his work on Judgments (§ 540, 4th ed.); and also by Black on Judgments (§ 95), and Hayne on New Trial and Appeal (§ 343). In *Baker v. Prewett*, 3 Wash. T. 474 (19 Pac. 149), it was held that an appeal would lie to the territorial supreme court from a default judgment. Respondent cites two cases from this court to support its motion—*Port v. Parfit*, 4 Wash. 369 (30 Pac. 328), and *State ex rel. Pacific Coast Steamship Co. v. Superior Court*, 12 Wash. 548 (41 Pac. 895). But in the former case it was stated that the defendant, by stipulation, withdrew her answer, and, by consent, a default was also entered against her, and the authority of the case is therefore inapplicable here. In the latter case the appeal was from the justice court, and, as stated in the opinion, governed by the

practice relating to that court. The motion to dismiss the appeal on the ground that it is from a judgment by default cannot be sustained.

2. It is also urged by counsel for respondent that the assignment of error by appellant is not sufficient, but the only question sought to be raised by appellant here is upon the sufficiency of the complaint to sustain the judgment, and its assignment of error is sufficient, under *Goetzinger v. Rosenfeld*, 16 Wash. 392 (47 Pac. 882), and *McReavy v. Eshelman*, 4 Wash. 757 (31 Pac. 35).

3. The vital question is, did the complaint state a cause of action against appellant? and this is the only question upon the record arising here. It is stated that street grade warrants were issued in payment of work done upon a street by a contractor payable out of a street grade fund, and the city had not collected, or attempted to collect, and could not have collected, from the special fund. The warrants specified the fund upon their face. In *German-American Savings Bank v. Spokane*, 17 Wash. 315 (47 Pac. 1103) the liability of a municipal corporation for street improvements was most elaborately and carefully considered. The previous decisions of this court were reviewed, and also other authorities, and the reasoning of the court in that case is decisive of the question involved in the case at bar. In that case the plaintiff sued to recover the amount due on street grade warrants issued to the contractor, and payable out of the street grade fund, and in the superior court obtained a general judgment against the city therefor, from which the city appealed. The foundation of the plaintiff's right of action was the delay and negligence on the part of the city's officers in providing the fund. In the case of *Wilson v. Aberdeen*, ante, p. 89 (52 Pac. 524) it was expressly ruled:

“Warrants issued by a city for street improvements, to

July, 1898.] Opinion of the Court — REAVIS, J.

be paid out of a special fund, cannot be collected against the city generally, although the remedy to collect from the special fund is lost."

The objection urged against the complaint, that it does not state facts sufficient to constitute a cause of action against the city of Spokane, is therefore determined by the two cases from this court above cited; and, upon the authority of those cases, the judgment of the superior court is reversed, with direction to enter judgment in favor of defendant in said cause.

SCOTT, C. J., and ANDERS, J., concur.

DUNBAR, J., dissents.

[No. 2785. Decided July 20, 1898.]

CENA PLANT, *Appellant*, v. E. F. CARPENTER, *Sheriff*,
Respondent.

JUDGMENT ON DEMURRER — CONCLUSIVENESS.

Where a third party intervenes in a pending action for the purpose of claiming property, and judgment is rendered against intervenor upon demurrer to the complaint in intervention, such judgment is conclusive against the assertion of the same rights in a subsequent action.

Appeal from Superior Court, Lewis County.—Hon. A. L. MILLER, Judge. Affirmed.

Edward F. Hunter, for appellant.

Reynolds & Stewart, for respondent.

The opinion of the court was delivered by

REAVIS, J.—Suit by plaintiff, Cena Plant, to enjoin the sheriff of Lewis county from executing a writ of restitution

issued in favor of the purchaser at a sale upon a decree of mortgage foreclosure, and to adjudge the writ void as against the plaintiff. On the 20th of January, 1896, judgment was rendered by the superior court of Lewis county in favor of the Commercial State Bank of Chehalis, plaintiff, against Salem Plant, for the sum of \$765.33, including costs, and for a foreclosure of a mortgage described in the complaint and sale of the premises to satisfy the judgment; and on the 29th of February, 1896, the mortgaged premises were sold under the judgment, and the mortgagee became the purchaser.

The complaint alleges that the sheriff is about to execute the writ and dispossess plaintiff, who is the wife of said Salem Plant, who executed the mortgage. It is also alleged that the premises mortgaged by Salem Plant were the homestead of Salem Plant and this plaintiff and their family, and that due selection thereof had been made by plaintiff, and notice given, and the facts are fully stated upon which plaintiff founds the claim of homestead. The answer of the sheriff denied that the premises were the homestead of plaintiff and her husband, and averred that the mortgaged premises were the separate property of the husband, Salem Plant, and that no selection of the homestead had been made. The answer also set up a plea of former adjudication of the homestead rights of plaintiff in the mortgaged premises. It is to this plea that we shall confine our attention.

The proof taken in the superior court and the record shows that after the decree of foreclosure in the suit between the Commercial State Bank, as plaintiff, and Salem Plant, as defendant, the plaintiff in this action intervened and set up fully in her complaint in intervention all the facts constituting her right to the homestead, and also demanded that the premises be declared a homestead and

July, 1898.] Opinion of the Court—REAVIS, J.

protected by the court. The plaintiff in the mortgage foreclosure suit was regularly summoned to answer the complaint in intervention, and the plaintiff therein appeared and filed its motion that the complaint be dismissed, because it was filed without leave of court and because it did not state facts authorizing the intervention, and the motion was sustained, with leave to the intervenor to re-file her complaint, which was done *instantly*, and the plaintiff thereupon renewed its motion against the complaint because it did not state facts sufficient to constitute a ground for intervention, which objection the court sustained; and the intervenor, Cena Plant, requested permission to file an amended complaint, which was granted, and she was allowed ten days in which to file and serve an amended intervening complaint. It appears that intervenor did not file the amended complaint, as directed by the order of the court; and thereafter the court, on the 26th day of December, 1895, adjudged that leave having been given intervenor to serve and file an amended complaint in intervention, and her attorney having stated in open court that the intervenor would not further appear in the action, and the plaintiff demanding default against the intervenor, such default was granted and entered; and thereafter a final decree of foreclosure was rendered in the cause, in which it was adjudged that the defendants, and all persons claiming under them after the commencement of the action, be forever barred and foreclosed of all right, title, interest and equity of redemption in the mortgaged premises, or any part thereof, and that the plaintiff recover from the said Cena Plant its costs incurred or taxable, in consequence of her appearance and pleading in the action, and that execution issue therefor. The intervenor in the foreclosure suit filed her bill in the nature of a cross complaint against plaintiff, and set up the facts constituting

grounds of action, alleging the same cause of action and demanding the same relief that she demands in this suit. In the former action the objection to the complaint in intervention, which was in the nature of a demurrer, confessed the facts and demanded judgment that intervenor stated no grounds for relief. The court sustained plaintiff's demurrer, and, in default of an amendment of the complaint in intervention, gave judgment against intervenor. No exception was taken to the ruling of the court upon the demurrer, and no appeal taken from the judgment for costs against intervenor in the foreclosure suit.

When a third party intervenes in an action pending for the purpose of claiming property, he is bound by the judgment. *Gumbel v. Pitkin*, 113 U. S. 545 (5 Sup. Ct. 616); *Benjamin v. Elmira, etc., R. R. Co.*, 49 Barb. 448; *Johnston v. San Francisco Savings Union*, 75 Cal. 134 (16 Pac. 753, 7 Am. St. Rep. 129).

Judgment upon a demurrer or objection to a complaint that it does not state facts sufficient to constitute a cause of action, when final, determines the merits of the cause as between the parties and their privies. The case of *Gould v. Evansville, etc., R. R. Co.*, 91 U. S. 526, was an action by plaintiff against defendants for debt, founded upon the judgment of a court of competent jurisdiction. Defendants pleaded in bar of the action a former judgment in their favor on a suit involving the same cause of action; that the defendants appeared in the action and demurred to the complaint, and the court sustained the demurrer and gave plaintiff leave to amend; but plaintiff declined to amend his complaint, and the court rendered judgment for the defendants. It does not appear that any appeal was prosecuted. The defendants maintained that the matters and things set forth in the complaint were the same as those set forth in the complaint in the last suit; that

July, 1898.]

Opinion of the Court — REAVIS, J.

plaintiff impleaded defendants in the former suit in a court of competent jurisdiction upon the same cause of action, disclosing the same ground of complaint and alleging the same facts to sustain the same; and that the court had jurisdiction of the parties and of the subject matter, and rendered a final judgment upon the merits in favor of defendants and against plaintiff; and that the judgment remained unreversed and in full force. The court said:

“Technical estoppels, it is conceded, must be pleaded with great strictness; but when a former judgment is set up in bar of a pending action, or as having determined the entire merits of the controversy involved in the second suit, it is not required to be pleaded with any greater strictness than any other plea in bar, or any plea in avoidance of the matters alleged in the antecedent pleading. Reasonable certainty is all that is required in such a case, whether the test is applied to the declaration, plea or replication, as the party whose pleading is drawn in question cannot anticipate what the response will be when he frames his pleading. . . . Decided cases may be found in which it is questioned whether a former judgment can be a bar to a subsequent action, even for the same cause, if it appears that the first judgment was rendered on demurrer; but it is settled law, that it makes no difference in principle whether the facts upon which the court proceeded were proved by competent evidence, or whether they were admitted by the parties; and that the admission, even if by way of demurrer to a pleading in which the facts are alleged, is just as available to the opposite party as if the admission was made *ore tenus* before a jury.”

The court also observes that a judgment rendered upon demurrer to the declaration or to a material pleading, setting forth the facts, is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be; and the rule is that facts thus established can never after be contested between the parties or those in privity with them. *Lee v. Kingsbury*, 13 Tex. 68 (62 Am.

Dec. 546) *Graham v. Culver*, 3 Wyo. 639 (29 Pac. 270, 31 Am. St. Rep. 105); *Miller v. Sherry*, 2 Wall. 237; *Hefner v. Northwestern Mut. Life Ins. Co.*, 123 U. S. 747 (8 Sup. Ct. 337).

In the intervention in the mortgage foreclosure, the intervenor submitted her rights to the homestead to trial. The final judgment of the court was against her. After judgment upon the demurrer, it was too late to withdraw from the intervention without leave of the court and making an express reservation of rights. The trial, under our code of procedure, arises upon an issue of law or fact. Where the facts are conceded, and the issue of law alone is determined, it is none the less conclusive upon the merits of the case.

We can see no error in the conclusion of the superior court in sustaining the plea of a former adjudication of the facts upon which the complaint in the present action is based. No opinion is expressed upon the other questions raised by counsel and the conclusions of the superior court thereon.

The judgment is affirmed.

SCOTT, C. J., and ANDERS and DUNBAR, JJ., concur.

[No. 2787. Decided July 20, 1898.]

PHILIP BAUM, *Appellant*, v. COUNTY OF WHATCOM,
Respondent.

BOND TO COUNTY FOR BENEFIT OF MATERIAL MEN — RECITALS — RIGHT
OF ACTION.

Where a bond executed by a contractor for the construction of public improvements, under Gen. Stat., § 2415 (Bal. Code, § 5925), in order to protect laborers and material men, contains all the conditions required by the statute, the recital that it was

19	626
122	364
19	626
138	54

July, 1898.]

Opinion Per Curiam.

taken as a common law, and not as a statutory, bond, would not vitiate it.

Where a county takes a bond from a contractor for the construction of a county road, under Gen. Stat., § 2415, for the benefit of laborers and material men, the right of action of a material man on account of supplies furnished is not against the county, but must be enforced against the bondsman and his sureties.

Appeal from Superior Court, Whatcom County.—Hon. H. E. HADLEY, Judge. Affirmed.

Fairchild & Bruce, and *Frye & Webster*, for appellant.
J. W. Romaine, for respondent.

PER CURIAM.—The defendant let a contract to one Moran for the construction and improvement of a county road. The contract provided that the contractor should execute a bond containing the provisions of § 2415, 1 Hill's Code (Bal. Code, § 5925). A bond was executed accordingly, but contained a recital that it was executed as a common law bond, and not in pursuance of the statute aforesaid, and also that under the decisions of the supreme court it was not required to take a bond to secure the performance of the contract, etc. The plaintiff furnished supplies to the contractor for his use in the construction of the road, which were not wholly paid for; and he brought this action against the county for a failure to take a bond under the statute, relying upon the statement in the bond that it was not taken thereunder, and upon the further fact that he, not being a party to the bond, could not avail himself of its provisions; citing *Sears v. Williams*, 9 Wash. 428 (37 Pac. 665). It being conceded that the bond contained all the conditions required by the statute, the recital that it was taken, not as a statutory, but as a common law, bond, would not vitiate it; and the case referred to was overruled in the particular mentioned in *State v.*

Liebes, ante, p. 589, decided July 6, 1898. The holding in that case disposes of this one, and the judgment is affirmed.

[No. 2674. Decided July 21, 1898.]

SEATTLE, LAKE SHORE AND EASTERN RAILWAY COMPANY *et al.*, Appellants, v. SOL. G. SIMPSON, Respondent, S. LOUISE ACKERMAN, Intervenor.

APPEAL—LIMITATION—SERVICE OF NOTICE—JURISDICTION BY CONSENT.

A judgment dismissing an action is a final judgment, and, under Laws 1895, p. 81 (Bal. Code, § 6502), the limitation upon appeal therefrom is ninety days after the date of entry of such judgment, and not the fifteen-day limitation upon all orders other than final orders, provided for by the same statute.

Under Laws 1895, p. 561, § 82, providing that notice of appeal to the superior court from the decision of the board of state land commissioners, as to the prior right to purchase tide lands, must be served upon the respondents, or upon their attorneys, within thirty days after the filing or entry of such decision, service of the appeal notice must be made upon the attorney of record for a respondent, and the superior court can take no jurisdiction of an appeal where admission of service of the notice appears to have been made by attorneys for respondent other than the attorney of record.

Where a court has no jurisdiction of an appeal the appearance therein or consent of the respondent would not confer jurisdiction.

Appeal from Superior Court, King County.—Hon. WILLIAM HICKMAN MOORE, Judge. Affirmed.

Struve, Allen, Hughes & McMicken, for appellants.

Thomas T. Littell, for respondent.

The opinion of the court was delivered by

ANDERS, J.—The appellants and the respondent, Simpson, each applied to the board of state land commission-

July, 1898.] Opinion of the Court—ANDERS, J.

ers to purchase a certain tract of tide land in King county. A hearing was had before the board and, after consideration of the evidence adduced upon both sides and the argument of counsel, the land in controversy was awarded to the respondent. From the decision of the land commissioners the railway company appealed to the superior court of King county. This appeal was dismissed and the complaint of the intervenor, Ackerson, filed therein, stricken out, on motion of the respondent. From the order and judgment of dismissal this appeal was taken.

The respondent moves to dismiss the appeal herein on the grounds and for the reasons that the notice of appeal was not given or the appeal taken from the order of the superior court within the time limited by law, viz., fifteen days after the service of a copy of the order and the written notice of the entry thereof upon appellants' attorneys; and that this court has no jurisdiction over the person of respondent or the subject matter involved in this proceeding. Both grounds of the motion are jurisdictional and, in effect, the same, for, if it is true that the appeal was not taken within the time prescribed by statute, then this court has no jurisdiction to hear and determine the cause. The order from which this appeal is taken was made and entered on January 28, 1897, and the notice of appeal herein was served on respondent's attorney on April 23, 1897—eighty-five days after said order was entered and notice thereof given. Section 1 of the act of March 8, 1893, relating to appeals to the supreme court (Laws 1893, p. 119, Bal. Code, § 6500) provides that, "Any party aggrieved may appeal" . . . 1. From the final judgment entered in any action or proceeding," etc., and "6. From any order affecting a substantial right in a civil action or proceeding, which either, (1) in effect determines the action or proceeding and prevents a final judgment therein; or

(2) discontinues the action," etc. Section 3 of this act, which relates to the time wherein appeals may be taken, was amended in 1895 (Laws 1895, p. 81) Bal. Code, § 6502, so as to read as follows:

"In civil actions and proceedings an appeal from any final judgment must be taken within ninety days after the date of the entry of such final judgment; and an appeal from any order, other than a final order, from which an appeal is allowed by this act, within fifteen days after the entry of the order. . . ."

And it is contended by counsel for the respondent that, while a judgment of dismissal is so far a final judgment that it may be appealed from, it is not a final judgment in the sense used in this act; that the final judgment mentioned in the first paragraph of § 1 is a judgment rendered after issue joined and trial had, and that it is from such a judgment only that the ninety days are allowed in which to appeal. And it is argued that such must have been the legislative intention, for otherwise there was no reason for the enactment of subdivisions 1 and 2 in paragraph 6 of said section. This argument is exceedingly plausible, and would be entitled to serious consideration were it not for the provisions of the amendment above quoted. It will be observed by an inspection of this amendment that final orders, as such, are not only recognized by the statute as it now stands, but are excepted from the operation of the fifteen days' limitation within which appeals must be taken from other appealable orders. A formal judgment of dismissal of the appeal from the board of commissioners was made by, and entered in the records of, the superior court; but whether it be called a judgment or order is not material, for the court will look at the effect rather than the form of the entry. An order in form may sometimes constitute a judgment in fact. It is said in Elliott on Appellate Procedure that,

July, 1898.] Opinion of the Court—ANDERS, J.

“Form is not a matter of much importance in determining whether a judgment is or is not final. If the controversy is ended between the parties so far as the court can end it, then the judgment is final, regardless of mere matters of form. This must necessarily be true, since if the order terminates the litigation in the court where it is pending, nothing more can there be done, except, perhaps, to prepare for an appeal. It is obvious that under this rule an order dismissing a case over the objection of the plaintiff may constitute a final judgment.” Elliott, Appellate Procedure, § 94.

And the doctrine there laid down seems to be supported by numerous cases cited in the note. That the ruling of the superior court determined the proceeding then pending before it is scarcely open to question. The general rule of law is that a dismissal, discontinuance or non-suit (and they all, in legal effect, amount to the same thing) in a legal proceeding without a trial upon the merits, operates as a final determination of the action and carries the entire cause out of court, and all the parties to the original proceeding. 6 Enc. Pl. & Pr., pp. 978, 979. It seems clear to us that the judgment appealed from was a final judgment and that the appeal was taken within the period (ninety days) prescribed by the statute. It follows therefore that the motion to dismiss the appeal must be denied.

This brings us to the consideration of the only remaining question, which is, whether or not the appeal from the board of tide land commissioners was properly dismissed. The statute in relation to such appeals provides that,

“Any person who is an applicant to purchase any tide lands may appeal from any finding or decision of the board of state land commissioners, as to the prior right to purchase such tide lands or any part thereof, which appeal shall be to the superior court of the county in which such tide lands are situate. Such appeal shall be taken by the party desiring to appeal serving upon the party in whose favor

said decision and determination is made, and also upon all other parties who have appeared in the contest before said board, or upon their attorneys, a notice in writing that he appeals from said decision and determination to the said superior court, which said notice of appeal must be served as aforesaid, and together with the proof or admission of service indorsed thereon or attached thereto, must be filed with the said board of state land commissioners within thirty days from and after said decision and determination is filed in writing or entered in the records of said board of state land commissioners." Laws 1895, § 82, p. 561.

The decision of the board from which the appeal was taken to the superior court was made and entered on June 30, 1896, and on the 27th of July following a notice of appeal was duly prepared and served upon one Eben Smith, who acknowledged due service of the same on said date in the name of "Smith & Littell, Attorneys for Sol. G. Simpson." The motion to dismiss the appeal was based upon the alleged grounds that no notice of appeal, either in writing or otherwise, had ever been served upon said Simpson or his attorney, and that all the pleadings, papers and record entries required by law had not been prepared and certified to the clerk of the superior court. It is shown by the affidavit of counsel for the respondent filed in the superior court, as well as by the records of the proceedings before the board of state land commissioners, that Thomas T. Littell was the sole attorney for Simpson in the contest between the latter and the appellants; and it is not claimed that Mr. Smith, at the time he assumed to acknowledge service of the notice of appeal, was a partner of Mr. Littell, or authorized to accept service of the notice for him. And the question is, was a service of the notice upon Smith such a service as is contemplated by the statute above quoted in relation to appeals from the decision of the land commissioners? It is a well settled rule that ap-

July, 1898.] Opinion of the Court—ANDERS, J.

pellate courts can only become vested with jurisdiction of a cause by a strict compliance with the terms of the statute, as appeals are purely statutory. It was not only necessary, under the statute, that the notice of appeal should be properly served within thirty days, but that it should also be filed within that time; both the serving and the filing of the notice were necessary in order to confer jurisdiction upon the superior court. *Franklin v. Reiner*, 8 Cal. 340; *Whipley v. Mills*, 9 Cal. 641; *Hastings v. Halleck*, 10 Cal. 31; *Bonds v. Hickman*, 29 Cal. 461; *Boyd v. Burrel*, 60 Cal. 280; *Oliver v. Harvey*, 5 Ore. 360.

But it is contended by the learned counsel for the appellants that it is morally certain that the respondent did in fact have notice of the appeal, for the reason that it is shown by the affidavit of said Eben Smith that, on receiving the notice, he delivered it "without delay" to the respondent's attorney. We are of the opinion, however, that that act did not constitute a compliance with the mandatory provisions of the statute. Appellants were required to serve their notice either *upon the respondent or his attorney*, and file the proof or admission of service with the commissioners within thirty days from the date of the entry of the decision appealed from. The record shows an admission of service by Smith & Littell, and not by Thomas T. Littell, who alone was authorized to admit service for the respondent; and this record evidence could not properly be changed or contradicted after the expiration of the time in which the admission of service could be filed. *Graham v. Conrad*, 66 Minn. 471 (69 N. W. 334).

It is further contended upon the part of the appellants that the respondent, by moving to strike the complaint in intervention, appeared generally in the cause, and ought not to be heard to question the notice. But it is a sufficient answer to this proposition to observe that, if the court

had no jurisdiction of the cause, the appearance or consent of the respondent could not confer jurisdiction. This question has frequently been determined by this court. *Cogswell v. Hogan*, 1 Wash. 4 (23 Pac. 835). And see *Sawtelle v. Weymouth*, 14 Wash. 21 (43 Pac. 1101). See, also, *Oliver v. Harvey, supra*; *Bonds v. Hickman, supra*.

Our conclusion is that the superior court, not having obtained jurisdiction, did not err in dismissing the appeal from the land commissioners, and the judgment will therefore be affirmed.

REAVIS and DUNBAR, JJ., concur.

GORDON, J.—I concur in the result, but not in holding that a record cannot be changed so as to show *the fact of service*, after the expiration of the time fixed by the statute.

[No. 2741. Decided July 22, 1898.]

DOUGLAS YOUNG, *Respondent*, v. THE STATE OF WASHINGTON, *Appellant*.

CONTRACTS BY GOVERNOR — LIABILITY OF STATE — RATIFICATION.

There being no constitutional or statutory provision, which, either expressly or by necessary implication, authorizes the governor to employ expert assistance for the purpose of investigating the books and accounts of the state penitentiary, the state is not bound by his contract employing an expert accountant for such purpose.

The fact that the legislature, subsequent to the making of an unauthorized contract by the governor, appropriates a smaller sum than the amount claimed, in payment of the services rendered under the contract, cannot be deemed a ratification, but amounts to no more than an adjustment and settlement of the claim by the legislature, thus withdrawing from the courts any jurisdiction to adjudicate upon the right to recover or the amount of recovery.

July, 1898.] Opinion of the Court—ANDERS, J.

Appeal from Superior Court, Thurston County.—Hon. CHARLES H. AYER, Judge. Reversed.

P. H. Winston, Attorney General, and *T. M. Vance*, for the State.

T. N. Allen, *Thomas B. Hardin*, and *Pierre P. Ferry*, for respondent.

The opinion of the court was delivered by

ANDERS, J.—The complaint in this action alleges that on the 18th day of December, 1894, the state of Washington, through and by its governor, employed the plaintiff to examine, expert and report to said governor, upon the books and accounts, vouchers, and the condition of affairs generally, with reference to the financial management of the state penitentiary at Walla Walla, during the term of warden Coblenz, and agreed to pay the plaintiff for his services in that behalf the reasonable worth and value thereof; that the plaintiff accepted said employment, and did well and faithfully examine, expert and report to said governor upon said books, accounts and vouchers, and condition of affairs generally, as to the financial management of said penitentiary, and in every respect faithfully discharged the duties of said employment and completed the same on the 13th day of February, 1895; that the reasonable value of said services so rendered by the plaintiff is the sum of \$860, of which sum the defendant has paid to this plaintiff the sum of \$430, and defendant has wholly failed and refused to pay to the plaintiff any other or greater sum whatsoever; that there remains due and unpaid from defendant to the plaintiff the sum of \$430, with interest thereon from the 13th day of February, 1895, at the legal rate of eight per cent. per annum. The defendant interposed a demurrer to this complaint on the grounds (1) that the court had no jurisdiction of the action,

and (2) that the facts alleged in the complaint did not constitute a cause of action. This demurrer was overruled, and the defendant answered by denying the material allegations of the complaint and averring affirmatively that whatever services were rendered by the plaintiff did not exceed in value the sum of \$430, which sum has been wholly paid to the plaintiff. A jury was waived and a trial had by the court; and the court found the facts substantially as alleged in the complaint, and thereupon gave judgment in favor of the plaintiff for the sum demanded, together with interest thereon from March 1, 1895. It is conceded by the learned counsel for the state that, if the state employed the respondent to perform the services which he actually rendered, the judgment of the court below should be affirmed; but he contends that no contract was entered into between the state and the respondent, for the reason that the governor did not possess the power to make such an agreement as is alleged in the complaint herein. The only question, therefore, to be determined, is whether or not the governor had legal authority to execute the contract on behalf of the state; and in determining this question it is necessary to ascertain the law upon the subject, for it is well settled that public officers have, and can exercise, only such power as is conferred upon them by law, either statutory or constitutional, and that the government is not bound by the unauthorized acts of its officers or agents. *Gibbons v. United States*, 8 Wall. 269; *Whiteside v. United States*, 93 U. S. 247; *Langford v. United States*, 101 U. S. 341; *Orton v. State*, 12 Wis. 509; *State ex rel. Coffin v. Horton*, 21 Nev. 466 (34 Pac. 316); *Randall v. State*, 16 Wis. 340; *Lewis v. Colgan*, 115 Cal. 529 (44 Pac. 1081); *People v. Talmage*, 6 Cal. 256; *Stanton v. State*, 5 S. D. 515 (59 N. W. 738).

July, 1898.] Opinion of the Court — ANDERS, J.

Our state constitution provides that the governor may require information in writing from the officers of the state upon any subject relating to the duties of their respective offices, and shall see that the laws are faithfully executed. Constitution, art. 3, § 5. And, in addition to the powers conferred upon the governor by the constitution, he is empowered by statute to supervise the conduct of all executive and ministerial officers, and to see that the duties of officers are performed, or, in default thereof, apply such remedy as the law allows. 1 Hill's Code, § 61 (Bal. Code, § 100). It is also made his duty to visit the state penitentiary at least once each year, and as much oftener as he may deem necessary, and provision is made for the payment of the necessary traveling expenses incurred by reason of such visits. 1 Hill's Code, § 1184 (Bal. Code, § 2777). But we nowhere find, either in the constitution or the statutes, any provision which, either expressly or by necessary implication, authorizes the governor to employ expert assistance for the purpose of investigating the books and accounts of the state penitentiary, or of any other state institution. We are, therefore, constrained to hold that the governor had not the power to bind the state by the contract in question. Nor can the act of the legislature appropriating \$430 for the payment of the claim of the respondent be deemed a ratification of the contract made by the governor. On the contrary, we think the legislature by its act not only repudiated such contract, but took upon itself the adjustment and settlement of the respondent's claim; and, having done so, the matter is ended, in so far as the state is concerned.

The question here under consideration was considered by the supreme court of Indiana in the case of *Julian v. State*, 122 Ind. 77 (23 N. E. 690). In that case the plaintiffs were employed by the attorney general of Indiana for

and on behalf of the state, with the approbation of the governor, secretary, auditor and state treasurer, to assist the attorney general in the examination of the title of the state to certain tracts of valuable land, and in the prosecution of suits to recover and quiet the title in the state to the same; and it was agreed that the compensation of plaintiffs should not be more than ten per cent. of the value of said land, or of the proceeds thereof when sold. The legislature of the state afterwards, in an act settling some of the suits in which the plaintiffs were engaged, provided that a certain percentage of the valuation of the property involved should be allowed to the plaintiffs as their compensation. Suits were afterwards brought by the attorneys to recover the full sum to which they claimed they were entitled under the contract with the attorney general, and the court held that there was no power in the attorney general or the governor to enter into the contract, and that the legislature by the act mentioned assumed the adjustment and settlement of the claim, and for that reason the court had no jurisdiction whatever over the same. And in discussing the question the court said:

“There was no legal liability on the part of the state to the appellant, and he had no right of action, which he could maintain, against the state prior to the passage of the act making the allowance. By recognizing the services rendered, and making an allowance in payment, the legislature took upon itself the adjustment of the claim and gave to the claimant no rights except to accept the amount allowed. The claimant must accept the provisions made for him as a whole; he cannot treat the act as a recognition of the liability of the state to pay, and refuse to accept the amount allowed. By the legislature passing an act adjusting the claim, it took the whole jurisdiction of the matter, and withdrew from the courts any jurisdiction to adjudicate upon the right to recover, or the amount to be recovered. The law authorizing the state to be sued only authorizes suits to be brought in cases where there is a

July, 1898.]

Syllabus.

liability on the part of the state to the claimant, which has not been adjusted by the legislature; but does not authorize suits where there only exists a moral obligation to pay, as may exist in cases of the appellants. In such cases payment is discretionary with the legislature, and its action is final; if it makes an allowance, the claimant may accept it or not, as he sees fit, and with this his rights end. He cannot maintain an action against the state for the payment."

The ruling in this case was approved in *Julian v. State*, 140 Ind. 581 (39 N. E. 923), and constitutes a complete answer to the argument of the learned counsel for the respondent as to the moral obligation on the part of the state to pay in this instance.

The judgment is reversed and the cause remanded, with instructions to sustain the demurrer to the complaint.

SCOTT, C. J., and GORDON, REAVIS and DUNBAR, JJ., concur.

[No. 2868. Decided July 25, 1898.]

FRANK CARROLL, *as Receiver, Respondent*, v. THE
PACIFIC NATIONAL BANK, *Appellant*.

19 639
22 1:8

CORPORATIONS — AUTHORITY TO DO BUSINESS — INSOLVENCY — PREFERENCES — RECEIVERS — COLLATERAL ATTACK.

Although a corporation may not have been legally formed, the objection cannot be raised by the corporation or one dealing with it, to the injury or loss of other parties.

The fact that an insolvent corporation makes payment of a \$1,250 note due a bank by transferring to the bank \$1,200 worth of whisky would justify an inference that the bank had knowledge of the insolvent condition of the corporation.

Where a court, having jurisdiction of the parties and the subject matter, appoints a receiver, the validity of the appointment cannot be challenged in a collateral action.

Appeal from Superior Court, Pierce County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

E. M. Hayden, for appellant.

Frank Allyn (*W. H. Pritchard*, of counsel), for respondent.

The opinion of the court was delivered by

REAVIS, J.—The New West Liquor Company was an association of several persons engaged in the liquor business in the city of Tacoma. In July, 1895, they filed articles of incorporation in the office of the secretary of state and the auditor of Pierce county. There was about \$6,000 worth of merchandise and probably a total of \$1,500 in accounts, at the time of the incorporation, which became the property of the company. The corporation does not seem to have had any authorized stock subscription, and its officers did not take the oath of office, but it was generally understood to be a corporation and did business under its corporate name. During this time it became indebted to the defendant bank in about the sum of \$1,250. This indebtedness was evidenced by notes signed "New West Liquor Company, by J. Hall, Manager." In May, 1897, the company paid its indebtedness to the defendant bank, appellant here, by selling it whisky of the value of \$1,200. During the same month and a short time thereafter, the plaintiff (respondent here) was appointed receiver of the corporation. The appellant was not a party to the application for the appointment of a receiver. The receiver was appointed at the suit of a simple contract creditor in an action against the corporation, and the respondent thereafter brought this action to set aside the transfer of the whisky to the bank. The superior court found that the New West Liquor Company was a corporation duly organized and existing under the laws of this

July, 1898.] Opinion of the Court — REAVIS, J.

state; that the receiver was a duly qualified and acting receiver of the corporation, regularly appointed in a certain action wherein Emma J. Haskin was plaintiff and the corporation was defendant; that on the 19th day of May, 1897, the date of the transfer of the whisky to appellant, the corporation was insolvent, and that the insolvency was known to the appellant and to the officers of the corporation at that date; and that at that date they made a transfer of the whisky to the appellant bank for the purpose of paying a pre-existing indebtedness. The superior court concluded that the property of the corporation on the 19th of May, 1897, it being insolvent, was a trust fund, in which all creditors of the corporation were entitled to share equally and ratably, and that the transfer of the whisky to the bank at that date was an attempted preference of the bank as one of the creditors of the corporation. The value of the property so transferred to appellant was stipulated at the trial at \$1,200, and the decree of the court was that that amount be paid to the receiver, or, in default, execution issue for the recovery of the same.

There is some conflicting testimony upon the question of the insolvency of the corporation on the 19th of May, 1897, and appellant excepted to the finding that the corporation was insolvent at that date. But an examination of the testimony and inferences that may be drawn therefrom does not warrant this court in disturbing the finding. In addition to some conflict between the witnesses, the fact of the payment of notes due a bank in whisky is an unusual one, from which legitimate inferences can be drawn in favor of the theory of respondent; and, while there was no formal subscription of the capital stock of the corporation, yet it was, at any rate, duly formed, and the legal restriction prescribed in our statute is against its doing business until such stock subscription is made. But, hav-

ing done business, the question cannot be raised, either by the corporation or one dealing with it, to the injury or loss of other parties. The finding of the superior court that it was a corporation is approved.

It is also urged by counsel for appellant that the objection to evidence of the appointment of the receiver should have been sustained, because the suit in which the receiver was appointed was begun by a simple contract creditor. It is a sufficient answer to this objection, however, that, in an action brought by a receiver for the recovery of property claimed by him by virtue of his receivership, the defendant cannot collaterally attack the order of the court appointing a receiver. Where a court has jurisdiction of the parties and the subject matter and appoints a receiver, the validity of the appointment cannot be challenged in a collateral suit. *High, Receivers* (3d ed.), § 39a, and authorities cited.

The judgment of the superior court is affirmed.

SCOTT, C. J., and ANDERS, DUNBAR and GORDON, JJ., concur.

[No. 3011. Decided July 25, 1898.]

19 642
124 412

THE STATE OF WASHINGTON, *on the Relation of Orville Clark, v. C. H. NEAL, Superior Judge.*

VENUE—ORDERS PENDING ACTION.

The fact that a judicial district comprises several counties does not warrant the judge in trying an application for alimony pending a divorce proceeding, in any other county of his district than the one in which the suit was instituted, when there has been no change of venue granted.

Original Application for Prohibition.

July, 1898.]

Opinion Per Curiam.

E. K. Pendergast, for relator.

PER CURIAM.—The relator in this case is the defendant in an action by Malvina L. Clark for a divorce, both parties being residents of Douglas county, in this state, and having resided there for a number of years last past. The action for divorce was brought in said county. Respondent is judge of the superior courts in and for the district comprising Lincoln, Adams, Okanogan and Douglas counties. The plaintiff applied for an order against the defendant to compel the payment of alimony, etc.; and a notice was served on him that said matter would be brought on for hearing before the respondent at Davenport, in Lincoln county. The defendant appeared specially and objected to the authority of the court to hear said matter, except in the county of Douglas, where the action was brought and was pending, which objection was overruled, but the hearing was continued. Whereupon the relator has applied for a writ of prohibition to prevent the respondent from proceeding with such hearing.

It has been stipulated between the parties that the facts set forth in relator's application are true and that if a writ is granted, a final one may issue, and not the usual alternative order. No brief has been filed by the respondent. There having been no change of venue applied for or granted, we are of the opinion that the relator's position is well taken and that the respondent had no authority to compel the defendant to appear outside of Douglas county for a trial of the matter in question. We are unable to perceive any distinction, so far as the right to a trial without the county is concerned, between a matter of this kind and a trial of the main issue. No statute has been called to our attention authorizing such a hearing, and the authorities of the relator seem to fully sustain his contention.

The writ should issue.

[No. 2789. Decided July 26, 1898.]

THE STATE OF WASHINGTON, *on the Relation of Ed. C. Young, Respondent*, v. PETER SMITH *et al.*, *Appellants*.

CITY EMPLOYEES—CIVIL SERVICE—CLASSIFICATION.

A flume tender, whose duty is the custody and care of the flume of a city water works system, and whose employment is of a permanent character is properly classified under civil service regulations in the official service instead of the labor service, when, under such regulations, official service comprises positions of a permanent character and labor service those of a temporary character.

Appeal from Superior Court, Pierce County.—Hon. J. A. WILLIAMSON, Judge. Affirmed.

Bates & Murray, for appellants.

Govnor Teats, for respondent.

The opinion of the court was delivered by

REAVIS, J.—Respondent was a flume tender appointed by the commissioner of public works of the city of Tacoma on the 27th of March, 1897, and immediately went to work thereon at the intake at Clover creek. He had been examined by the civil service commission in its examination for flume tender, and received a standing of the highest eligible, except one, in the examination, and was placed upon the eligible list by the chief examiner of the civil service on March 24, 1897, and so certified to the commissioner of public works previous to his appointment. While so engaged as flume tender he was forcibly ousted from such position by the appellants. The city of Tacoma, by amendment of its charter, in April, 1896, adopted civil service in the appointing and employment of persons to

July, 1898.]

Syllabus.

office and employment, and the civil service commissioners classified the offices and places with reference to examination. No appointment to any of the said offices and places in the classified service could be made, except according to the civil service amendment to the charter and the rules and regulations made in accordance therewith. The classification of the civil service was made as "official service" and "labor service"; official service comprising those positions of a permanent character and labor service that of temporary employment. The employment or office designated as "flume tender" was of a permanent character, and classified by the civil service commission under the official service. The duty of the flume tender was the custody and care of the flume of the water works system, which belonged to, and was operated by, the city.

The only question is, was the service of the respondent properly classified, and was it official? It was permanent, and the duties designated by the city, rather than by contract, and we think that it could be so classified. This was the view taken by the superior court, and its judgment is affirmed.

ANDERS and DUNBAR, JJ., concur.

[No. 2871. Decided July 26, 1898.]

F. O. CHEZUM, *Respondent*, v. SAMUEL PARKER, *Appellant*.

19	645
29	371

SALE—DELIVERY OF BILL—WRONGFUL ATTACHMENT—MITIGATION OF DAMAGES—EXCLUSION OF EVIDENCE—INSTRUCTIONS—IMPROPER ARGUMENT.

A finding by the jury that a bill of sale for certain personalty had been delivered to plaintiff is warranted, when the evidence shows that plaintiff and the owner of the goods had agreed on the sale in satisfaction of an existing indebtedness, but the bill

had not been delivered because not acknowledged; that it was left with the owner, who agreed to have it acknowledged and also remarked that it would be in a certain drawer in his desk, if anything happened to him; that the owner absconded, and the plaintiff, on securing entrance to the owner's office, found a note advising him that the bill of sale was in the drawer as agreed upon, "and was hereby delivered to you"; and that the plaintiff went into possession of the property, and had surrendered to the former owner's attorney the evidences of indebtedness in consideration of which the sale had been made.

In an action against a sheriff for wrongful attachment, he cannot show in mitigation of damages that he had sold the property under chattel mortgage, while in his possession under the attachment levy, when notices of sale had not been posted according to the statutory requirements necessary to make the foreclosure legal; nor could the costs of such illegal foreclosure be deducted from the value of the property.

Where proffered evidence was properly excluded, a wrongful reason assigned therefor would not constitute error.

A charge to the jury that there must be mutuality in the fraudulent intent in order to render a bill of sale fraudulent as to other creditors is proper, when the evidence in the case shows that the sale in question was made as a preference of one creditor over others.

A judgment will not be reversed on the ground of improper argument by counsel, unless it appears that counsel, against timely objection made, has abused the license of argument, and that prejudice has resulted therefrom to the opposing party.

Appeal from Superior Court, Pierce County.—Hon. THOMAS CARROLL, Judge. Affirmed.

Eric E. Rosling, and *Theodore L. Stiles*, for appellant.

John Arthur, and *Ira A. Town* (*G. L. McKay*, of counsel), for respondent.

The opinion of the court was delivered by

GORDON, J.—Respondent brought this action to recover the value of certain furniture and law books which he alleges were taken from his possession and converted by the defendant. The answer denied that respondent was the

July, 1898.] Opinion of the Court—GORDON, J.

owner of the goods and affirmatively alleged that one Likens was the owner, at the time when possession of them was taken by the appellant, as sheriff of Pierce county, under and by virtue of a warrant of attachment issued in an action then pending in the superior court of that county, in which action P. V. Caesar, agent, was plaintiff, and said Likens was defendant. The answer further alleged that the attempted sale and transfer of the property from Likens to the respondent was made in fraud of Likens' creditors. The jury found for the plaintiff, and from the judgment entered upon their verdict the present appeal was taken.

There are a great many assignments of error, but the main questions to be determined may be considered under a few heads. At the trial, plaintiff relied upon a bill of sale which was executed by Likens and acknowledged on the 5th day of October, 1896. In his own behalf he testified that at that time Likens was indebted to him on certain notes, in an amount aggregating \$1,975, a portion of which indebtedness was of long standing; that Likens was financially embarrassed and respondent had been pressing him for a settlement; that it was finally agreed between them that Likens should transfer and sell to plaintiff the property in question, in consideration of which plaintiff should release and cancel the indebtedness. At the time of reaching that agreement the bill of sale was drawn up, signed and witnessed, but not dated or acknowledged; Likens retaining it for the purpose of having it acknowledged, and also stating to plaintiff that, if anything happened to him, the plaintiff would find the bill of sale in a certain drawer in his desk. It also appears that Likens was accustomed to leave letters and papers for appellant in this drawer, and that plaintiff would get them therefrom. Testimony was given which tended to show that Likens was at that time anticipating the commencement of legal

proceedings against him of a criminal nature; also, that he absconded on or about the 6th or 7th of October, 1896. On the morning of October 8th, the office having been locked for a couple of days, plaintiff secured a key from the janitor of the building, entered the office, and in the drawer referred to found the bill of sale; also, the following letter, which was received in evidence:

“Tacoma, Wash., Oct. 7, '96.

F. O. Chezum, Citv—

Dear Sir: Referring to our conversation about my indebtedness to you and the (the) settlement of our business affairs, I have concluded to carry out the arrangement we agreed upon and I have left for you a bill of sale of all my office furniture, library and all the property in my office. The paper is in the drawer of my desk, with the keys is hereby delivered to you. Very respectfully,

W. W. Likens.”

Thereupon respondent took possession of the office, scratched Likens' name from the door, placed his own name thereon and took steps towards leasing the rooms. On the morning of the 9th, defendant took possession under the warrant of attachment. It is contended that there was no sufficient proof of the delivery of the bill of sale, but we think the plaintiff's own testimony, if believed by the jury, was sufficient upon that point. Plaintiff was in actual possession prior to the levy of the attachment, and it is not necessary to consider or determine what the effect would have been had the attachment been levied prior to the actual receipt of the bill of sale and possession by the plaintiff. It is also contended that there was no sufficient evidence of a consideration for the sale. The testimony tended to show that the notes held by the plaintiff had been surrendered to John Arthur, and there was also evidence from which the jury were warranted in finding that Arthur was the attorney for Likens, with authority to represent him.

July, 1898.] Opinion of the Court — GORDON, J.

In the bill of sale it is recited that the property was sold subject to a mortgage of \$320. In addition to what has already been stated concerning the pleadings, the answer alleged that on the 23d day of November, 1896, Wilcox, the mortgagee, delivered to the defendant, as sheriff, the mortgage and note thereby secured, together with notices of sale, and required defendant to foreclose and sell the property according to law; that thereupon the defendant, as sheriff, issued and posted the notices, and thereafter sold the mortgaged property, and after satisfying the mortgage and paying the costs and expenses of foreclosure, turned a surplus amounting to \$128.50 over to the court, subject to the attachment of Caesar, agent, etc.

At the trial the defendant offered in evidence the note, mortgage, notices of sale and other papers pertaining thereto, which were excluded upon respondent's objection; and error is predicated upon this ruling. Upon behalf of respondent it is contended that these papers were incompetent and the foreclosure proceedings void, for various reasons, among others, because neither from the papers so offered, nor from the other evidence, does it appear that there was any attempt to show that any notice of foreclosure was served upon Likens, the mortgagor, or posted in the manner required by law. Appellant strenuously insists that they were admissible in mitigation of damages. It is a well settled general rule of law that, where property has been appropriated to the owner's use by his consent, the facts may be shown in mitigation of damages. *Pierce v. Benjamin*, 14 Pick. 356 (25 Am. Dec. 396); *Bates v. Courtwright*, 36 Ill. 518; *Curtis v. Ward*, 20 Conn. 204; *Watson v. Coburn*, 35 Neb. 492 (53 N. W. 477); *Bowman v. Davis*, 13 Colo. 297 (22 Pac. 507); *Stix v. Keith*, 85 Ala. 465 (5 South. 184).

We take it that a like rule should prevail where the prop-

erty is applied to the payment of a valid, subsisting mortgage, and in this case the bill of sale was taken subject to the mortgage. The rule which permits a trespasser to show a subsequent appropriation to the plaintiff's use proceeds upon the theory that the plaintiff has consented, either expressly or impliedly, to such appropriation, and the law implies such consent where the property is legally seized and sold. *Bates v. Courtwright, supra*. But in the present case defendant was not entitled to have the record of the foreclosure proceedings submitted to the jury, because, as we have seen, the proceedings were not taken pursuant to the statute. The posting of notices of the sale was essential to a legal foreclosure, and a sale without such notice would be absolutely void. Nor was appellant entitled to have the costs of such invalid foreclosure proceeding added to the mortgage debt, and deducted from the value of the property, as found by the jury. The court charged the jury that their verdict, if in plaintiff's favor, should be for the value of the property at the time it was taken, less the amount of the mortgage, and appellant has no substantial ground for complaining of this instruction. In the reply brief, counsel urges that the objection that the record of the foreclosure proceeding was incompetent is made in this court for the first time, and that the papers were excluded by the trial court because they were deemed to be immaterial. So long as the court was right in excluding the proffered evidence, it is not important what the reason assigned therefor was.

The court did not err in refusing to give defendant's requests 2, 3, 4, 5, 6 and 7. The subject matter to which these requests referred was properly and fully covered by instruction No. 4, as given by the court. That instruction was full and ample, and certainly as favorable to the appellant as he had any right to demand. Indeed, we think it

July, 1898.] Opinion of the Court—GORDON, J.

would have been highly improper for the court to have emphasized particular portions of the evidence by giving the instructions as requested by appellant.

Error is also predicated upon the giving of the following instruction, viz.:

“As a general rule, to render a sale or conveyance fraudulent as to creditors of the vendor, there must be mutuality of participation in the fraudulent intent on the part of both the vendor and the purchaser. Thus, applying the rule to this case, if you do not believe from a preponderance of the evidence that both Likens and the plaintiff Chezum shared in a fraudulent intent pursuant to which the bill of sale was made and delivered, you will not be justified in finding it to be a fraudulent transaction.”

It is contended that the jury should not have been instructed that actual knowledge of Likens' fraudulent intent was necessary; that, if the plaintiff had notice sufficient to put him on inquiry, he could not be a *bona fide* purchaser. As applied to the evidence, the instruction complained of was right. While the rule contended for by appellant might in many cases be proper, it is not applicable to the evidence in this case. Wait, *Fraudulent Conveyances*, § 199; *Jaeger v. Kelley*, 52 N. Y. 274. Without specific mention of other objections urged to the charge, we deem it sufficient to say that we regard them as without merit, and are convinced that the charge, as a whole, fairly submitted the case to the jury and embraced all of the issues upon which they were required to pass.

It is contended that the court committed reversible error in refusing to stop what is alleged to have been improper argument to the jury by plaintiff's counsel. Upon objection being made, the court instructed the jury, “that they would not be guided by the statements of counsel, but would be guided by the evidence.” From the record we are unable to say that counsel went beyond the limit which

is permissible in a closing argument. By way of illustration, elucidation or explanation, a wide range of comment may, in the discretion of the trial court, be indulged. And it is only in a case where counsel has abused this license, and the court its discretion, in permitting unjustifiable argument to be indulged in against timely objection made to it, that this court would be warranted in reversing a judgment for that reason alone, and not then if it was reasonably apparent that no prejudice had resulted therefrom.

Upon the entire record we think the judgment appealed from must be affirmed.

SCOTT, C. J., and DUNBAR and REAVIS, JJ., concur.

ANDERS, J., not sitting.

[No. 3018. Decided July 27, 1898.]

COUNTY OF PIERCE, *on the Relation of R. W. Maloney et al., Appellants, v. W. D. C. SPIKE, County Auditor, Respondent, C. S. GIFFORD et al., Intervenor and Respondents.*

TAXATION—BOARD OF EQUALIZATION—CITIES OF FIRST CLASS—STATUTES—IN PARI MATERIA—REPEAL BY IMPLICATION.

The act of March 9, 1893 (Laws 1893, p. 167), as amended by Laws 1895, p. 407 (Bal. Code, tit. 11, ch. 2), making provision for the assessment and collection of taxes in cities of the first class, being upon a special subject in regard to taxation, and the general revenue laws passed at the same session, are *in pari materia*, and must be construed together.

Section 9 of the act of March 9, 1893, as amended by the act of March 21, 1895 (Laws 1895, p. 407, Bal. Code, § 1786), providing that, for the equalization of taxes in cities of the first class, a committee of three from the city council shall be selected to act with the county board of equalization, is not impliedly repealed by the general revenue law of 1897, which provides that

July, 1898.] Opinion of the Court—REAVIS, J.

the county commissioners shall constitute the board of equalization, since such provision is intended to be of general application and is in the same terms as the like provision in the general revenue law of 1893, and must be construed together with the special laws as *in part materia*, in the absence of an express repealing clause.

Appeal from Superior Court, Pierce County.—Hon. THOMAS CARROLL, Judge. Affirmed.

A. R. Titlow, for appellants.

O. G. Ellis, and W. H. Pritchard, for respondents.

The opinion of the court was delivered by

REAVIS, J.—Application for a writ of prohibition to the superior court of Pierce county against the auditor of Pierce county, as *ex-officio* clerk of the board of equalization, to prohibit him from administering oaths to Gifford, Sampson and Holgate, as a committee selected by the city council of the city of Tacoma, for the purpose of sitting with relators, who are the county commissioners of Pierce county, to form the board of equalization for the equalization of tax assessments and values of property in the city of Tacoma for the year 1898. Upon hearing, the writ was denied in the superior court and relators have appealed.

Upon the argument here the respective parties, conceding the emergency demanding an immediate decision of the merits involved in the controversy, have submitted the cause to this court without any question upon the method of procedure, or the parties to the action; and the court does not now decide any such questions. The single question presented here and decided is, who constitute the board of equalization of assessment of property situated within the territorial limits of a city of the first class for all purposes of taxation, state, county and municipal, for the year 1898?

Appellants maintain that the county commissioners, as *ex-officio* members of the board of equalization, constitute

the complete board for the equalization of assessments for all purposes of state, county and city taxation. Respondents contend that in Pierce county, containing the city of Tacoma, a city of the first class, the board for the equalization of assessment of property within the limits of the city for all purposes of taxation, is composed of the county commissioners, and a committee of three members of the city council, selected by the council. Various constitutional provisions have been mentioned by counsel for appellants, in objection to the constitution of a different board of equalization in the assessment and taxation of property in a city of the first class, and property outside of the territorial limits of the city in the county; but the mandate of the constitution is that the legislature shall provide by law a uniform and equal rate of assessment and taxation upon all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property. The board of equalization of taxes within certain districts, and for correction of errors in assessments, is a part of the usual machinery in the assessment and collection of taxes. The constitution of such board and the designation of the persons composing it are matters of legislative discretion. For a long time the boards of county commissioners have been selected in their respective counties, by law, to compose the members of the board of equalization. So far as the mere question of power is considered, it is competent, however, for the legislature to constitute those boards, and select their members and designate the number of members from any qualified persons; and the only inquiry, therefore, is, what statute designates the board of equalization for cities of the first class?

Prior to the legislative session of 1893, the respective cities and towns of the state had their own machinery for

July, 1898.] Opinion of the Court—REAVIS, J.

the assessment and collection of taxes for all municipal purposes. In 1893, however, by act of March 9 (Laws 1893, p. 167), the assessment and collection of the taxes for such cities was vested in the county officers, the levy being made by the city council, and provision was also made for compensation to the county by the city for the expense of the assessment and collection of municipal taxes. Under the act of March 9, 1893, the equalization of the assessment of property for taxation in all cities of the first class was made by the county board of equalization. This act related to a particular subject. The same legislature enacted a general revenue law for the state (Laws 1893, p. 347), in which the general provision for the composition of the board of equalization was the same as had theretofore been the law and enacted in 1891. And again, in Laws 1897, p. 162, (Bal. Code, § 1714), relating to the same general subject, the same provision was made for the composition of the county boards of equalization. The titles of these respective general revenue laws were the same. The revenue law of March 15, 1893, repealed all acts and parts of acts providing for the assessment and collection of taxes in the state, existing before its enactment. But it was decided in the case of *State ex rel. Seattle v. Carson*, 6 Wash. 250 (33 Pac. 428), that the general revenue law of March 15, 1893, only affected laws relating to state taxation generally, and had no application to the special provisions of the law of March 9, 1893, relating to the collection of taxes in cities of the first class. But in 1895 various sections of the act of March 9, 1893, were amended. Section 9 of the former act was amended to read as follows:

“Sec. 9. This act shall supersede all conflicting provisions of law or charters of cities of the first class relating to the assessment, equalization and collection of general taxes for municipal purposes: Provided, That in counties

having cities of the first class the city council thereof shall select a committee of three members of such council to act with the board of county commissioners as a board of equalization, and shall have the powers and perform the duties concerning the equalization of assessments in their respective cities that are given to the county boards of equalization by the general revenue laws of the state. The city council may provide for the compensation of the members of the committee for the time they are actually engaged as members of the board of equalization." (Bal. Code, § 1786).

The amendment, in substance, provided a board of equalization for the equalization of values and the correction of errors in assessments within the territorial limits of cities of the first class, and such board was composed of the county commissioners and a committee of three members of the city council. The contention of appellants is that the act of March 9, 1893, as amended by the act of March 21, 1895 (Laws 1895, p. 407), was repealed by the act of March 15, 1897 (Laws 1897, p. 136, Bal. Code, tit. 11, ch. 1). If such repeal were made, it was by implication. Section 58 (Bal. Code, § 1714) of the latter act provides for the composition of the board of equalization for the county. It is the same in this respect as the laws of 1891 and 1893. But, as we have seen in *State ex rel. Seattle v. Carson*, *supra*, it has been determined that the general revenue act of 1893 had no application to the special provision of the laws relating to collection of taxes in cities of the first class, of March 9, 1893, *supra*. They were statutes *in pari materia*. Then the re-enactment in the general revenue law of 1897, in § 58, *supra*, relating to the composition of the county board of equalization, was a continuation of the law of 1893, not a new enactment, and therefore no repugnancy was created that had not theretofore existed between the general act and the particular act. The revenue act of 1897 does not contain any repealing clause.

Aug. 1898.]

Syllabus.

If the legislature had in mind the particular act relating to cities of the first class, as amended in 1895, and desired to repeal it, it would have been so expressed. But without such expression of an intention to repeal, we do not see the force of the contention that the provision for constituting a board of equalization for cities of the first class was repealed.

The judgment of the superior court is therefore affirmed.

DUNBAR and ANDERS, JJ., concur.

[No. 2659. Decided August 4, 1898.]

WILLIAM BIRMINGHAM, *Appellant*, v. NEAL CHEETHAM,
State Auditor, et al., Respondents.

19	657
25	225

DEMURRER — OBJECTIONS NOT RAISED — INJUNCTION — RESTRAINING
PUBLIC OFFICERS.

A demurrer on the grounds that the complaint does not state a cause of action and that there is no equity in the complaint, would not raise the question of the legal capacity of plaintiff to sue.

Although the ground of objection on which a demurrer to a complaint was sustained in the court below may not have been raised there, the ruling will be affirmed on appeal, if it appears that the complaint does not state a cause of action against defendants, and that the insufficiency of the facts stated was raised by demurrer.

Injunction will not lie to restrain the officers of the state from complying with the provisions of an act of the legislature requiring them to perform certain public duties, in the absence of a showing that the complainant will be peculiarly and directly injured by the acts complained of.

Appeal from Superior Court, Pierce County.—Hon.
THOMAS CARROLL, Judge. Affirmed.

Doolittle & Fogg, for appellant.

P. H. Winston, Attorney General, and *Thomas M. Vance*, Ass't Attorney General, for respondents.

The opinion of the court was delivered by

ANDERS, J.—The plaintiff seeks by this action to restrain the chief grain inspector of the state from further employing or retaining in his employ deputy inspectors, or incurring other expenses under the grain inspection act, and from approving or certifying as correct any bills or accounts for the services of said deputy inspectors, or other expenses; to enjoin the state auditor from signing or issuing any warrants upon the grain inspection fund; and to prevent the state treasurer from paying any warrant or warrants drawn upon said fund out of the moneys belonging thereto. In order that the questions involved herein may be properly understood, it becomes necessary to set forth the substance of the complaint. It is alleged substantially in the complaint that the plaintiff is a citizen and taxpayer of Pierce county, state of Washington, and that he brings this action for himself, and in behalf of the other taxpayers of the state, and in behalf of all such other persons as may be engaged in buying, selling, transporting or handling grain, affected by and subject to the grain inspection laws of this state; that the defendant Wright is the duly appointed and qualified chief grain inspector of the state of Washington; that the defendants Cheetham and Young are, respectively, the duly elected, qualified and acting state auditor and treasurer; that, during all the times in the complaint mentioned, plaintiff has been, and now is, engaged in buying, selling and transporting, handling and shipping wheat, oats and other grain at the city of Tacoma, in the county of Pierce, and in other counties in the state; that all of the grain so purchased, shipped, sold and handled by plaintiff has been inspected, and has been and is subject to

Aug. 1898.]

Opinion of the Court—ANDERS, J.

inspection under the laws of the state of Washington, and the chief inspector and his deputies have been and now are supervising and exercising exclusive control of the weighing and grading of all grain so purchased, handled, shipped and sold by plaintiff; that plaintiff has been and now is handling and shipping grain by the car load, and every such car load of grain is inspected by said chief inspector or his deputies and graded, and said inspector and his deputies have charged up against the plaintiff all the fees and forfeitures for each of said cars of grain so shipped by plaintiff, which said several sums and amounts plaintiff has duly paid; that plaintiff purchased and has in use, and has had in use for many years proper and suitable scales for weighing grain, and has had and now has said scales in frequent and almost constant use; that the said chief inspector has had full supervision of the inspection of all grain, and the weighing of the same on plaintiff's scales, and said chief inspector and his chief deputies have examined, tested and corrected said scales in weighing grain, and have issued to plaintiff a license, for which plaintiff has paid the amount required and provided by law; that plaintiff maintains, and has maintained for several years last past, a warehouse and commission house where grain is received and weighed in the city of Tacoma, and has obtained, and now has, the license required by law therefor; that for all services per-penses of and concerning the grain so purchased, handled, shipped or sold by plaintiff, and of and concerning said scales and warehouse, and of and concerning all the salaries and expenses of and under said grain inspection act, plaintiff has paid, and now is required and is continuing to pay, the various sums and amounts as provided by the grain inspection laws of the state of Washington; that plaintiff has a personal and pecuniary interest in the subject matter of this action and in the relief herein prayed for; that

the legislature of the state of Washington, in March, 1895, passed an act entitled "An Act to provide for state grain weighing and grading, creating the office of state grain inspector, establishing a grain commission, and making an appropriation of \$2,000," which act was approved March 19, 1895 (Laws 1895, p. 253); that § 38 of said act appropriates the sum of \$2,000 out of any money in the state treasury not otherwise appropriated, to be credited to the grain inspection fund, and to be used to inaugurate and carry into effect the provisions of said act, and that the said sum has heretofore been fully paid out and expended and used to inaugurate and carry into effect the provisions of said act; that it is provided by § 36 of said act:

"All moneys collected by the chief inspector or his chief deputies as herein provided shall be paid into the state treasury by the chief inspector on or before the fifteenth day of each month, accompanied with a statement showing from what source collected and the amount of such collections. It shall be the duty of the state treasurer to receive all moneys aforesaid, and to credit the same to the grain inspection fund, and said fund is hereby appropriated for the purpose of carrying out the provisions of this act;"

that, under and in pursuance of the provisions contained in § 36, large sums and amounts of money have been and are now being collected by the chief inspector and his deputies from plaintiff in this action and other persons, firms and corporations in the state of Washington handling and dealing in grain, and the same has been paid into the said inspection fund in the treasury of the state; that the defendant Neal Cheetham has been and now is issuing warrants from time to time upon said grain inspection fund for the payment of the amount of bills as approved by the said chief inspector, for and including the salary of deputy inspectors and other employees and for other current expenses of said grain commission and inspector; and the said C. W.

Aug. 1898.] Opinion of the Court—ANDERS, J.

Young, as treasurer, has been and now is paying said warrants so drawn upon said fund out of the moneys therein as contributed thereto and paid therein by plaintiff and other individuals, firms and corporations dealing in and handling grain in the state of Washington; that it is provided by § 4 of art. 8 of the constitution of the state of Washington that:

“No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years from the first day of May next after the passage of such appropriation act, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum;”

that said § 36 of said grain inspection act is unconstitutional and inoperative because it does not distinctly specify the sum to be appropriated; and the said defendant Cheetham has no authority, under said act or otherwise, for drawing warrants upon said grain inspection fund, and the defendant Young has no power or authority to pay money out of said fund upon said warrants; that there is no money in said grain inspection fund, other than the moneys derived by collections from plaintiff and other individuals, firms and corporations handling and shipping grain, other than said sum of \$2,000 provided for in § 38 of said act, which sum has all been long since fully paid out and disbursed by the treasurer of the state of Washington (except that the legislature of this state at its March, 1897, session appropriated the sum of \$3,600 for salary of grain inspector and \$2,000 for clerk hire), and no appropriation whatever was made for deputies or other salaries or expenses; that the period of limitation referred to and fixed by said § 4 of

art. 8 of the constitution terminated and expired on the first day of May, 1897, and all power, right and authority to draw warrants upon and pay money out of said grain inspection fund by defendants, if any authority they ever had, ceased and expired on the first day of May, 1897; that the said defendants Cheetham and Young, in violation of their duty and of the rights of the plaintiff and other taxpayers and persons handling and dealing in grain subject to inspection, propose and threaten to respectively continue to draw warrants upon said grain inspection fund for the salary of deputy inspectors and for other salaries and expenses, and pay the same out of moneys collected from plaintiff and other individuals, firms and corporations dealing in grain, all to the great and irreparable harm and injury of this plaintiff and other individuals, firms and corporations dealing in grain subject to inspection in the state of Washington; that the defendant Cheetham, unless restrained and enjoined in this court, will pretend and claim that, under and by virtue of the provisions of the said act of the legislature of March 19, 1895, he has the right to issue warrants upon said grain inspection fund to pay deputy inspectors, clerks, employees and other expenses, and the defendant Young will claim that he has the right to pay said warrants out of the moneys in his hands as such treasurer, belonging to said fund, and said defendants are claiming and will claim that said act is now a valid and subsisting law in the state of Washington, under which they have the right to so issue and pay warrants as aforesaid; that plaintiff, as well as all other taxpayers of the state, and as well as all other individuals, partnerships and corporations engaged in handling grain subject to the inspection laws of the state, is without remedy save in a court of equity; that no remedy whatever can be had in a court of law; that, even if there was a remedy in law, the same would involve

a multiplicity of suits, and would be so uncertain and protracted as to be of no avail; that under the provisions of the said act no money was appropriated by law other than the \$2,000 mentioned in § 38 of said act, and that after the expenditure of said sum there was no warrant or authority in law for the auditor of said state to draw a warrant on such grain inspection fund, nor was there warrant or authority in law for the treasurer of said state to pay any one so drawn; and all moneys that have been paid out of said fund after the paying out of said \$2,000 have been so paid out unlawfully and without authority of law, because there was no appropriation distinctly specifying the sum appropriated; that said chief inspector has appointed, and now has in his employ and under his control, a number of deputy inspectors, who are attempting to perform the duties of their office; and said chief inspector is incurring other and additional expenses in carrying out the provisions of said grain inspection act, and has and is about to and will prepare bills for all said services of said deputy inspectors and other expenses as above stated, and said chief inspector has and is about to, and will from time to time, approve all said bills and certify that the same are correct, and present the same to the said state auditor, who has drawn, and will from time to time, as said bills are so presented, draw warrants for the various amounts so certified on the grain inspection fund, and the said state treasurer has paid and will pay the same, upon presentation, out of said fund; that the said defendant Wright, as such chief inspector, intends and threatens to continue to employ deputy inspectors and incur other expenses in connection with said grain inspection and approve, and certify as correct, bills, accounts and claims for the services of said deputy inspectors and other expenses as aforesaid, and present the same to the state auditor for issuance of warrants thereon on said

grain inspection fund; that the said defendants Cheetham and Young have proposed, and now intend and threaten to issue, and are about to issue and cause to be issued, warrants upon said grain inspection fund, and they threaten and intend to pay or cause said unlawful warrants to be paid out of said grain inspection fund, and to draw and pay warrants upon said fund for salary of deputy inspectors and other expenses connected with and growing out of said inspection act; all in violation of the said constitutional provisions, and to the great injury of this plaintiff and other taxpayers, and to the great injury of all persons, partnerships and corporations dealing in and handling grain and paying money into said fund under the provisions of said act, for the reason that said money will thus be wrongfully dissipated and paid out by said defendants, and, as a necessary consequence, no money will remain in said fund with which to pay and discharge lawful warrants that may hereafter be lawfully drawn upon and issued against said fund, and such unlawful payment and dissipation of said fund will necessitate and require further and additional fees, charges and costs to be levied and assessed against plaintiff and other individuals, partnerships and corporations in the state of Washington handling and dealing in grain, and it will cause and necessitate further and additional taxes, levies and assessments to be made, borne and paid by plaintiff and all other taxpayers of said state, and by persons, firms and corporations handling and dealing in grain subject to the grain inspection law, to the irreparable injury and detriment of all these, and to the objects and purposes of said grain inspection act.

To this complaint the defendants interposed a demurrer on the grounds, (1) that the complaint does not state a cause of action against them, or either of them; and (2) that there is no equity in said complaint, as against said defendants, or either of them. This demurrer was sustained, the

Aug. 1898.] Opinion of the Court—ANDERS, J.

court assigning as a reason therefor that the plaintiff has no sufficient interest and no legal capacity to maintain this action. The plaintiff declined to plead further, and thereupon the court rendered judgment against him dismissing the complaint and for costs, to reverse which this appeal is prosecuted.

Section 189 of the code of procedure provides that the defendant may demur to the complaint when it appears upon the face thereof "(2) that the plaintiff has no legal capacity to sue," or "(6) that the complaint does not state facts sufficient to constitute a cause of action." Each of the grounds of demurrer specified by this section is separate and distinct from all others, and has no relation whatever to any other; and we therefore entirely agree with the contention of counsel for the appellant that the question of want of legal capacity to sue was not raised by this demurrer in the court below, and therefore cannot be considered in this court. But it does not necessarily follow from this that the judgment must be reversed. On the contrary, if it appears that the complaint does not state a cause of action against the several defendants, the judgment must be affirmed, regardless of the reason upon which it was based by the trial court. Every complaint, in order to state a cause of action, must show some primary right possessed by the plaintiff and some corresponding duty resting upon the defendant, and that such right has been invaded and such duty violated by some wrongful act or omission on the part of the defendant. Pomeroy, Code Remedies (3d ed.), § 519. Tested by this fundamental rule, it seems perfectly clear to us that no case for an injunction is made against the chief grain inspector. Each and every act which we are called upon to restrain is authorized and required by the statute creating the office of chief grain inspector. Section 2 of the statute provides that he shall appoint such

a number of deputy inspectors as may be necessary to properly and thoroughly inspect the grain as received, and carry out the provisions of the act. The statute also requires him to approve the bills for salaries of his deputies and for other expenses, and to certify the same as correct. These things he has done in compliance with the terms of the statute, and in so doing he has not only discharged his own duties, but has violated no duty owing to plaintiff. If he had refused to inspect plaintiff's grain, or to test and correct his scales, or to issue the proper licenses provided for by the act, the plaintiff would then have had just grounds of complaint. It is impossible for us to comprehend how or in what respect the appellant will be injured by any act of the chief inspector here complained of, and, in the absence of some direct injury to appellant, the official conduct of the inspector cannot be properly interfered with by injunction. And, as to the two other respondents, the case seems to us little, if any, less clear. The statute expressly provides that the state auditor shall draw warrants upon the grain inspection fund for salaries of the deputy inspectors, and for other expenses properly approved and certified by the inspector, and that the treasurer shall pay warrants so drawn out of the grain inspection fund.

But it is claimed that the plaintiff and appellant's rights are hereby infringed; that the moneys of the state have been and will be dissipated and frittered away, to his irreparable injury and damage; and that if such warrants are drawn and paid out of the inspection fund, there will be nothing left therein with which to pay lawful warrants. Under the statute, such warrants as those complained of by the appellant are the only *lawful* warrants that can be drawn against, and paid out of, that fund, for the inspection fund is set aside for the express purpose of paying the salaries of deputies and other expenses mentioned in

Aug. 1898.] Opinion of the Court—ANDERS, J.

the complaint, and for no other purpose whatever; and, in our judgment, the plaintiff's contention that he has a special and pecuniary interest in this fund, because he has contributed to it, cannot be sustained. When the fees for inspection and for licenses provided for by the act of March 19, 1895, are paid into the state treasury, they immediately become the property of the state, or, in other words, public funds; and the plaintiff has no more interest in such fund than an ordinary tax payer has in the general fund of the state. But appellant insists and alleges in his complaint that, if these officials continue to draw and pay these warrants, it will necessarily result in additional fees and in the imposition of greater taxes, and thus increase his pecuniary burdens. But how that result can obtain it is difficult to perceive. The fees and licenses required to be paid by grain dealers are fixed and limited by the statute, and it is further provided that the expenses of inspecting and grading grain shall never exceed the receipts from fees, licenses and forfeitures. The question of taxation cannot properly be considered in the disposition of this case, for, under the statute, no taxes can be levied for the payment of the expenses of inspecting grain; and, besides, no one is proposing or threatening to assess or levy taxes for such purpose, or even to increase the present statutory fees. Nor does the fact that one of the sections of the act under which these officials are proceeding is alleged to be unconstitutional give the plaintiff any right to interfere with the disposition of the grain inspection fund by the officials to whom such disposition has been confided by the legislature. It was well said by the supreme court of Mississippi, in discussing the question here under consideration, that

“Neither an executive nor a ministerial officer can be enjoined generally from putting a law in force. . . . The complainant who seeks an injunction must be able to

specify some particular act, the performance of which will damnify him, and it is such an act alone that he can restrain. This court has no power to examine an act of the legislature generally and declare it unconstitutional. The limit of our authority in this respect is to disregard, as in violation of the constitution, any act or part of an act which stands in the way of the legal rights of a suitor before us; but a suitor who calls upon a court of chancery to arrest the performance of a duty imposed by the legislature upon a public officer, must show conclusively, not only that the act about to be performed is unconstitutional, but also that it will inflict a direct injury upon him." *Gibbs v. Green*, 54 Miss. 592.

See, also, *Thompson v. Commissioners of the Canal Fund*, 2 Abb. Pr. 248; 2 High, Injunctions (3d ed.), § 1326.

In effect, the appellant simply asks this court to interfere by injunction to restrain the officers of the state from complying with the provisions of an act of the legislature of the state requiring them to perform certain public duties; and this the courts cannot do, in the absence of a showing that the complainant will be pecuniarily and directly injured by the acts complained of. Notwithstanding the able argument of counsel for appellant, we are constrained to hold that the judgment of the court below was right, and it will therefore be affirmed.

DUNBAR, GORDON and REAVIS, JJ., concur.

Aug. 1898.]

Syllabus.

[No. 3021. Decided August 6, 1898.]

JOHN P. JONES, *Appellant*, v. CITY OF SEATTLE *et al.*,
Respondents.

MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS — NOTICE TO PROPERTY OWNERS — ASSESSMENTS — BONDS — CONTRACTS — LOWEST BIDDER.

Notice to a property owner of a proposed improvement of a street abutting on his land is not necessary, when the statutes and city charter authorize the city council to undertake such improvements upon the filing of a petition therefor by a majority of the abutting property owners.

A city is authorized to include the cost of that portion of a street improvement which is included in the limits of street intersections in the assessment against the property in the assessment district, as provided by Laws 1897, p. 316, authorizing cities to do so, if provision therefor is made by ordinance, when the city has so far complied with the statute as to pass an ordinance declaring that all street improvements shall be governed thereby in that respect, since such general ordinance must be construed together with the special ordinance authorizing the making of the improvement in question.

Under a law requiring the city council to let all contracts for street improvements to the lowest bidder, it is within the discretion of that body to call for bids for different portions of the work, if it appears to the council that the whole improvement can thereby be made at a less cost than by one letting.

Notice to property owners of a proposed improvement, made by publication for fifteen days in the official newspaper of the city, is sufficient to bind them, when the city charter provides for such notice in such cases.

Notice by mail to an abutting property owner, as provided in Laws 1893, p. 231, § 1, sent by the city clerk thirty days before the issuance of bonds for the cost of a street improvement, in order to give him an opportunity to redeem from the assessment against his property, is sufficient.

A charter requirement that an ordinance for the issuance of bonds to cover the cost of a street improvement shall prescribe their form and may provide that the entire issue shall be issued to the contractor, is sufficiently complied with, where a contract providing for delivering to the contractor the entire issue of bonds

was made prior to the passage of the ordinance approving the assessment roll, and the bonds conformed to a general ordinance prescribing the form of all local improvement bonds, which was in force at the time the contract was entered into.

Appeal from Superior Court, King County.—Hon. WILLIAM HICKMAN MOORE, Judge. Affirmed.

John P. Hoyt, for appellant.

W. E. Humphrey, Ira Bronson, and Burke, Shepard & McGilvra, for respondents.

The opinion of the court was delivered by

GORDON, J.—Appellant is the owner of certain lots in the city of Seattle, which were included within the limits of an assessment district established for the purpose of paying the expenses of replanking and otherwise improving a part of First avenue in said city. He brought this action for the purpose of enjoining the city from issuing, and respondent Smart & Co. from receiving, certain improvement bonds in payment of the contract price for said improvement, which was undertaken pursuant to the provisions of ch. 96, Laws 1893, p. 231; ch. 110, Laws 1897, p. 316; and various provisions of article 8 of the city charter adopted March 3, 1896. The lower court sustained separate demurrers to the complaint; and, the plaintiff having refused to amend and elected to stand by his complaint, judgment was given dismissing the action, and the plaintiff has appealed.

1. The first objection urged is that no notice of hearing or intention of the council to act upon the subject matter of making the improvement was ever given or made. It appears from the complaint that the proceeding was instituted by a petition to the city council, which petition was signed by the owners of a majority of the property fronting upon the street and assessable to pay the cost of

Aug. 1898.] Opinion of the Court — GORDON, J.

the improvement. It was not necessary that any notice should be given before the council could legally act upon this petition. It being conceded that the petition conformed to the statute and was joined in by the owners of the property chargeable with the cost of the improvement, the council were authorized to proceed forthwith without giving any notice. Subdivision 2 of § 11 of article 8 of the city charter expressly authorized the council to proceed upon receiving such a petition, and neither the charter nor any provision of the statute requires notice.

2. The act of 1897 (Session Laws, p. 316), in effect provides that, when local improvements are ordered in a city of the first class, the cost of that part of the improvement included within the limits of the street intersections may be included in the amount of the total cost assessed against the abutting property; and § 2 provides that, before exercising the power granted by that act, the city council shall, by general ordinance, declare its intention to make such improvement under the provisions of that act. The act also contains this provision, viz.:

“Nothing herein shall be construed as repealing or modifying any existing manner and method for cities of the first class to make improvements as herein provided for, but shall be construed as an additional and concurrent power and authority.”

It is claimed that the ordinance which authorized the improvement in question did not comply with this act; but it appears from the complaint that by ordinance No. 4492, approved May 5, 1897, the city council declared it to be the intention of the city to make all improvements of the character here called in question under the provisions of the act of 1897, *supra*. The provisions of that ordinance must be considered in connection with the special ordinance providing for this improvement. The two must be

construed together. In fact, §3 of the ordinance directing and authorizing this improvement, provides that the assessment "shall be made upon said property in all respects as provided by said article 8 of the city charter as now in force, and said ordinance No. 3349 as amended by ordinance No. 3440." Construing this special improvement ordinance in connection with the general ordinance to which it expressly refers, it becomes at once apparent that the improvement is made pursuant to the act of 1897, *supra*, which, as we have seen, authorizes the inclusion in the amount of the total cost assessed to the property included within the assessment district of the cost of that portion of the improvement which is included within the limits of street intersections; and the objection is without force.

3. It is next urged that, under the system adopted by the council for the letting of contracts, it is impossible to determine whose bid would be the lowest, the law requiring that all contracts "shall be let to the lowest bidder." Under the system referred to, different portions of the work are segregated and bids are received for each portion. We think this is a matter solely within the discretion of the city council; and if it is decided by them, as it was in the present instance, that, by pursuing such a course, the whole improvement can be made at less cost than by one letting, there is nothing in the law applicable to the case which will prevent such a course being pursued.

4. Section 12 of article 8 of the city charter provides that, upon return of the assessment roll, notice must be given in the official newspaper of the city notifying all persons interested of the filing of the roll and requiring them to appear at a time fixed (not less than fifteen days from the date of the notice), and make objections thereto. Such notice was given in the present case, and it is urged that it

Aug. 1898.] Opinion of the Court—GORDON, J.

is insufficient. No authorities are cited to sustain this view, and, inasmuch as the notice is in compliance with the charter requirement, we are disposed to hold it sufficient. We are also inclined to think that the notice in the present case might be held sufficient, under *New Whatcom v. Bellingham Bay Improvement Co.*, 16 Wash. 131 (47 Pac. 236).

5. What has been said under the last point discussed is sufficient to dispose of the contention that the notice to the property owner of his opportunity to redeem from the assessment was insufficient. The notice in question was mailed by the clerk, and conforms in every respect to § 1 of ch. 96, Laws 1893, p. 231.

6. The final contention is that the ordinance providing for the assessment in the present case did not prescribe the form of the bonds to be issued; and subdivision 3 of § 13 of article 8 of the city charter is relied upon in support of the contention. Among other provisions in that section is the following:

“Such ordinance shall prescribe the form of bonds to be issued, and may provide that the entire issue of bonds shall be issued to the contractor in payment for the making of the improvement. Otherwise the city comptroller shall sell the bonds at not less than their par value net, and pay the proceeds thereof to the city treasurer, to be by him kept in the fund to be paid out on warrants drawn thereon as other city moneys are disbursed by him.”

The contract for the improvement in the case we are considering was entered into long before the passage of the ordinance approving the assessment roll, and the contract in terms provided for paying the contractor by delivering to him the entire issue of bonds. This course is authorized by the section of the charter just quoted; and it is admitted by the complaint that at the time of entering into the contract, and at all times since, there was in force a

general ordinance of the city which prescribed the *form of all local improvement bonds*, or bonds issued in payment of improvements of the character with which we are at present concerned. This, we think, was a substantial compliance with the requirements of the charter.

We think the demurrers were properly sustained, and the judgment of the superior court is affirmed.

SCOTT, C. J., and ANDERS, REAVIS and DUNBAR, JJ., concur.

19	674
19	686

19	674
22	414

19	674
636	585

[No. 2915. Decided August 22, 1898.]

G. H. BACON *et al.*, *Appellants*, v. CITY OF TACOMA,
Respondent.

CITY WARRANTS — NON-PAYMENT — REMEDIES — MANDAMUS.

Where warrants have been issued by a city, the proper remedy is not an action at law to recover the amount due thereon, but mandamus to compel their payment, even if the liability of the city is disputed on the ground they have been once paid or are forgeries, since Laws 1895, p. 118, § 21 (Bal. Code, § 5760), permits the trial of disputed questions of fact in mandamus proceedings.

Appeal from Superior Court, Pierce County.—Hon. J. A. WILLIAMSON, Judge. Affirmed.

Edward E. Cushman, Francis W. Cushman, and Charles Ethelbert Claypool, for appellants.

W. H. Pritchard, and Walter M. Harvey, for respondent.

The opinion of the court was delivered by

ANDERS, J.—The plaintiffs and appellants brought this action to recover the amount alleged to be due upon three

Aug. 1898.] Opinion of the Court—ANDERS, J.

certain warrants of the city of Tacoma. It is alleged as to each warrant that it was issued and delivered on September 18, 1893, for value received, by the duly authorized agents and officers of the city, and that it was presented for payment on September 21, 1893, to the treasurer of said city and indorsed by him, "not paid for want of funds;" that no payments have been made thereon, though plaintiffs have often demanded payment of the defendant; that the city has sufficient money in its general fund properly applicable for the purpose to pay the several warrants and accrued interest thereon. It is further alleged, on information and belief, that the refusal of the defendant, its agents and officers, to pay said warrants, is for the reason that there is a dispute as to the facts between plaintiffs and defendant as to whether there is anything due on each of said warrants, defendant claiming it has been paid and is a forgery, which plaintiffs deny. A general demurrer was interposed to the complaint and sustained by the court, and, plaintiffs declining to plead further, judgment was rendered against them, dismissing the complaint and for costs, from which judgment this appeal was taken.

It appears that the only question argued or considered in the court below was whether plaintiffs had resorted to the proper remedy, the respondent contending that mandamus against the treasurer of the city is the only proper remedy, and that the appellants could not maintain an ordinary action at law to collect the amount of the warrants. And this contention raises the sole question presented to this court for determination. The learned counsel for the appellants, while recognizing the general rule that mandamus is the proper remedy to compel a city treasurer to pay city warrants in the order prescribed by law, nevertheless insists that the fact that the complaint in this case shows that there is a disputed question of fact, takes the

case out of the ordinary rule of procedure. This contention seems to be based upon what was said upon this proposition in the first opinion of this court in *Bardsley v. Sternberg*, 17 Wash. 243 (49 Pac. 501); but it will be noticed, by reference to that case, that the question was not there deemed material, and, further, that the court there overlooked the plain provisions of our own late statute upon this question. By the act of March 13, 1895, entitled, "An Act regulating special proceedings of a civil nature," the proceeding in mandamus is assimilated as nearly as possible to ordinary actions at law. It is deemed a special civil proceeding, and the statute (§ 16, Laws 1895 p. 117, Bal. Code, § 5755) provides that the writ of mandate may be issued to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station, etc. And § 20 (Bal. Code, § 5759) of the act provides that on the return of the alternative writ, or the day on which the application for the writ is noticed, the party on whom the writ or notice is served may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action. And in § 21 (Bal. Code, § 5760) it is provided that if an answer be made which raises a question as to a matter of fact essential to the determination of the motion and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had and a verdict certified to the court. A new trial is also provided for, and provision is made as to the mode of proceeding in case no answer be made. The parties to the action are known as plaintiff and defendant, as in ordinary cases. From these provisions, it is manifest that questions of fact may be tried and

determined either by the court or by a jury, if a jury is demanded, and such is held to be the law in other jurisdictions. See *Ireland v. Hannell*, 90 Iowa, 98 (57 N. W. 715); *Jones v. Morgan*, 67 Cal. 308 (7 Pac. 734); *Raisch v. Board of Education*, 81 Cal. 542 (22 Pac. 890); *Falk v. Strother*, 84 Cal. 544 (24 Pac. 110); *Thomas v. Town of Mason*, 39 W. Va. 526 (20 S. E. 580).

That the appellants have mistaken their remedy is shown by the following decisions of this court: *Cloud v. Town of Sumas*, 9 Wash. 399 (37 Pac. 305); *Abernethy v. Town of Medical Lake*, 9 Wash. 112 (37 Pac. 306).

The case last cited was, like this, an action against a municipal corporation, and in respect to the remedy this court made the following observations:

“The complaint shows a settled and allowed claim against the town, and the issuance of slightly irregular warrants which can, upon demand, be replaced by proper general fund warrants of the same dates. These can be had upon application to the mayor and clerk, and, if they refuse, mandamus will lie to compel the performance of their duty. These warrants the treasurer must pay in the order of their issuance, out of any funds coming into his hands belonging to the general fund, and, if he refuses, a like suit will lie against him. The statutes prescribe how municipal corporations shall pay ordinary contract debts, viz., by the issuance of a warrant payable in its order, with interest from date of presentation. But it is not contemplated that the owner of an allowed claim shall sue the corporation generally, upon the original contract, when the clerk or other officer refuses to issue a warrant; nor that the holder of a warrant which the treasurer declines to pay shall get a judgment upon the warrant. Such a judgment, like a judgment upon a claim disallowed, would again be settled by a warrant, and take its turn in the order of payment. The contracting powers of the town have done all they can by the making of the contract and the allowance of the claim; it is the ministerial officers who are now in

fault, and the plaintiff must move them to action before he is entitled to any other remedy."

In the *Cloud case* the plaintiff had advanced moneys to the defendant, taking its warrants therefor, and, on failure of payment, sued the town to recover the amount advanced, and in the course of its opinion this court said:

"If this action can be maintained upon the warrants which have been issued, then a like suit might be maintained upon the warrants issued in satisfaction of this judgment, and so on, without limit. Clearly the law contemplates no such proceedings. The plaintiff, already has the town's evidences of indebtedness, issued to him in regular form, and if the treasurer should refuse to pay them in their regular order, he can resort to a mandamus to compel such payment. . . . And the questions, if they are further insisted upon, affecting the legality of such warrants, can be tried in that proceeding."

And so it may be said here, that if the plaintiff should maintain this action and recover judgment against the city, all he would get in satisfaction of his judgment would be other warrants, such as he now has. And it is therefore apparent that not only this, but any other action of like character would be entirely futile. If, as it appears from the complaint, the treasurer is of the opinion that the warrants have been paid, or that they are forgeries, the burden is upon him to establish such defense. The city has performed its whole duty in the premises by causing the warrants to be issued and signed by its proper officers, and it does not appear anywhere in the complaint that it is interposing any objections to their payment. It is manifest, therefore, that it should not, in the present status of the case, at least, be harassed by an action of any character whatever. Under the charter and ordinances of the city it is the legal duty of the treasurer to pay warrants properly drawn, and, if he has any valid excuse for not paying, it is

Aug. 1898.] Opinion of the Court — ANDERS, J.

incumbent upon him to set it forth and establish it by sufficient proof.

We are of the opinion that the judgment of the court below was right, and it is therefore affirmed.

GORDON and DUNBAR, JJ., concur.

[No. 2972. Decided August 22, 1898.]

THANKFUL SAVAGE, *Appellant*, v. W. A. STERNBERG,
as Treasurer of the City of Tacoma, Respondent.

CITY WARRANTS — MANDAMUS TO ENFORCE PAYMENT — DEFENSES — VOID
INJUNCTION — PARTIES.

The fact that a city has been enjoined from paying certain warrants cannot be set up as a defense to mandamus proceedings to compel payment by one who was not a party to the injunction suit.

A party or officer is not bound by a void injunction or order of the court, and will not be punished for its violation.

In an action of mandamus by a warrant holder against a city treasurer to enforce payment of a warrant duly executed by the proper city officers, the city is not a necessary party defendant, as the presumption is that the claim evidenced by the warrant was properly audited and allowed.

Appeal from Superior Court, Pierce County.—Hon.
THOMAS CARROLL, Judge. Reversed.

O. G. Ellis, and *A. H. Denman*, for appellant.

W. H. Pritchard, and *Walter M. Harvey*, for respondent.

The opinion of the court was delivered by

ANDERS, J.—This was an application for a writ of mandate to compel the treasurer of the city of Tacoma to pay five certain city warrants. It is shown by the averments of the petition and affidavit that the city was indebted to the

19	679
29	677
19	679
30	236
19	679
84	434
19	679
40	606

Fox Island Clay Works, and that the warrants in question were issued on account thereof; that they were issued to the payee therein named on September 18, 1893, and that they were presented to the city treasurer for payment on September 21, 1893, and indorsed by him, "not paid for want of funds;" that they were subsequently delivered to the appellant for value, and that appellant is now the owner and holder of the same; that the treasurer has money in his hands sufficient to pay the warrants, and applicable to the payment thereof. It is also alleged in the petition and affidavit that, prior to the commencement of this action, the payment of said warrants was demanded of the city treasurer, and that the said treasurer refused to pay said warrants, because he and the city of Tacoma had been enjoined from paying said warrants in a certain action in the superior court of Pierce county wherein one D. F. Murry was plaintiff and the said W. A. Sternberg and the city of Tacoma were defendants; that in said action in the superior court of Pierce county, wherein said Murry was plaintiff and this defendant and others were defendants, the city of Tacoma, and this defendant and others, were enjoined from paying any general fund warrants issued by the said city of Tacoma between the 16th day of August, 1892, and the 19th day of April, 1894, on the ground that all warrants issued between said dates had been once paid; that the said warrants were erroneously included in this injunction, and have never been paid; that neither the plaintiff herein, nor any person interested in the warrants herein sued upon, was a party to the action wherein said Murry was plaintiff. A demurrer was interposed to the petition and affidavit on the grounds (1) that there is a defect of parties defendant; (2) that the petition and affidavit do not state facts sufficient to authorize the issuance of the writ; and (3) that plaintiff has a plain, speedy and ade-

Aug. 1898.] Opinion of the Court—ANDERS, J.

quate remedy at law. This demurrer was sustained by the court, and, the plaintiff having elected to stand upon her complaint, judgment was rendered against her for costs, and dismissing her action, from which judgment this appeal is taken.

The principal question discussed in the briefs of counsel, and, in our view of the case, the only one requiring an extended discussion here, is whether the injunction was a sufficient excuse for the refusal on the part of the city treasurer to pay appellant's warrants. That it was sufficient is stoutly asserted by counsel for the respondent, and in support of their contention the following cases are cited: *Ohio & I. R. R. Co. v. Commissioners of Wyandot County*, 7 Ohio St. 278; *State ex rel. Mills v. Kispert*, 21 Wis. 392; *Ex parte Fleming*, 4 Hill, 581. The decisions in these cases seem to have been based solely upon the proposition that the court would not place the defendant between two fires by subjecting him to contradictory orders. It is said in the Ohio case that, if the writ of mandate should issue, the defendant would be guilty of contempt if he did not obey it, while, on the other hand, he would be equally in contempt for disobeying the decree of injunction. While we entertain the greatest respect for the learning and ability of the courts which rendered these decisions, we are not disposed to follow them, for the reasons—first, that they impliedly, at least, seem to concede that a person may be bound by a judgment although he was not a party to the action in which it was rendered; and, second, that they in effect concede, contrary to the rule announced by this and other courts, that a violation of a void order or judgment will subject the party disregarding it to punishment as for contempt.

In *State ex rel. News Pub. Co. v. Milligan*, 3 Wash. 144 (28 Pac. 369), this court held that an officer of the city of

Tacoma was not bound by an injunction of the superior court which was void for lack of jurisdiction in the court. It is true that, in that case, the court had not jurisdiction of the subject-matter, but the result would have been the same had there been want of jurisdiction of the person. Upon this subject, Mr. Freeman, in his work on Judgments (4th ed., § 116), says:

“If the want of jurisdiction over either the subject-matter or the person appears by the record, or by any other admissible evidence, there is no doubt that the judgment is void.”

And in the following section he states what we deem would be held to be good law everywhere, that

“A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers.”

And Judge Van Fleet declares the law to be that, if a judgment is lacking either in jurisdiction of the subject-matter or of the person, it is entirely worthless, no matter in what court rendered, and no one is bound to obey it. The oath of all officers compels them to disregard it. And he further says that a few cases hold that want of jurisdiction over the person does not make the judgment of the superior court void, but they are out of line and wrong on principle. Van Fleet, Collateral Attack, § 16. And in accordance with this principle this court, in the case of *Stallcup v. Tacoma*, 13 Wash., at page 152 (42 Pac. 544; 52 Am. St. Rep. 25), observed:

“The remaining allegations of the complaint are directed to questions which, in our view, ought not to be considered by a court of equity without having all of the parties direct-

Aug. 1898.] Opinion of the Court—ANDERS, J.

ly affected by the decree before it. . . . Such a decree could have no binding force as against strangers to the record."

That a party or officer is not bound by a void injunction or order of the court, and will not be punished for violation thereof, was also decided in the following cases: *In re Sawyer*, 124 U. S. 200 (8 Sup. Ct. 482); *Ex parte Fisk*, 113 U. S. 713 (5 Sup. Ct. 724); *In re Ayers*, 123 U. S. 443 (8 Sup. Ct. 164); *Walton v. Develing*, 61 Ill. 201; *Andrews v. Knox County*, 70 Ill. 65; *Darst v. People*, 62 Ill. 306; *Lamb v. Railroad Co.*, 39 Iowa, 333; *Salling v. Johnson*, 25 Mich. 489; *Smith v. People*, 2 Colo. App. 99 (29 Pac. 924). And that it is the duty of an officer to obey the law, rather than the order of the court, is expressly announced in *Walton v. Develing*, *supra*, in which the court said:

"The court, as well as the inferior officer, must be governed by the law. When the law imposes a positive duty upon a public functionary, and a court commands him not to perform it, he must obey the law and disobey the writ of the court."

Nor is our view that the injunction was not available as a defense in this case without the support of high authority elsewhere. In *Mayor v. Lord*, 9 Wall. 409, which was a mandamus proceeding to compel the mayor and aldermen of the city of Davenport to levy a tax to pay a judgment obtained against the city by the plaintiffs, and in which the defendants pleaded that they had been enjoined from levying the tax, the court said:

"The injunction cannot avail the respondents. The relator was not a party to the proceeding."

And in *Smith v. Commissioners*, 2 Woods, 596, which was a mandamus to compel the commissioners to levy and collect a tax for the payment of coupons detached from

bonds, the court held that an injunction in which the plaintiffs were not parties, restraining the commissioners from levying and collecting any tax to pay said indebtedness, was not a good defense to the proceeding. In the course of his opinion, Justice BRADLEY of the supreme court, sitting as circuit justice, used the following language with respect to the injunction:

“The court of county commissioners of Tallapoosa county is under injunction, it is true, not to do the very thing which a mandamus from this court would require them to do. But they cannot be embarrassed by this, because the act of the law as well as the act of God can always be pleaded in excuse of performing or not performing an act. The mandamus of this court would be an act of the law, which could thus be pleaded by the commissioners in excuse of not obeying the injunction, and such an excuse will undoubtedly be accepted by the chancery court. This is so, not because this court has any superiority over that court, but from the nature and circumstances of the case, and particularly from the fact that the plaintiffs in this case were not parties in that court. Had they been parties, and had they instituted suit and obtained judgment against the injunction of the chancery court, they would be guilty of contempt, and answerable therefor to that court. But, not being parties, they are not affected by the proceedings had therein, and cannot be deprived of the execution of their judgments.”

It seems to us that the above states the true doctrine upon this question, and the same principle was announced on the authority of *Mayor v. Lord*, *supra*, in *Clews v. Lee County*, 2 Woods, 474. In *State ex rel. Merle v. Dubuclet*, 26 La. An. 127, which was a proceeding by mandamus to compel the state treasurer to pay certain state warrants, it was likewise held that the plea that the treasurer had been enjoined from paying them was insufficient. See, also, *United States v. Council of Keokuk*, 6 Wall. 518.

It is suggested by the learned counsel for the respondent that there is a defect of parties appearing upon the face of the petition and affidavit; but we think otherwise. We must presume that the claims evidenced by these warrants were properly allowed by the city council and audited by the comptroller, for the presumption is that all officers perform their duties. And the fact that these warrants were signed by the president of the council and the city clerk, countersigned by the comptroller, indorsed by the city treasurer, and are now in the possession of the appellant, raises the presumption that they have not been paid, and it is the duty of the treasurer, enjoined by the law under which he is acting, to pay such warrants, and, if he has any defense, it is incumbent upon him to establish it. In *Bacon v. Tacoma*, ante, p. 674 (54 Pac. 609), we endeavored to show that, under our statute, mandamus is the proper remedy to compel the city treasurer to pay warrants properly drawn upon him, and that in such a proceeding all essential matters of fact may be tried and determined, and the authorities there cited are applicable here. It is therefore unnecessary to enter into a discussion of these questions at this time.

For the foregoing reasons the judgment of the court below is reversed, and the cause remanded, with instructions to overrule the demurrer.

GORDON and DUNBAR, JJ., concur.

[No. 2919. Decided August 30, 1898.]

J. M. GRIFFITH, *Respondent*, v. H. B. STRAND *et ux.*,
Appellants.

FRAUD — SALES — FALSE REPRESENTATIONS — REMEDY OF BUYER —
 PAROL PROOF.

Parol proof of fraudulent representations is admissible for the purpose of avoiding a written contract induced by them, and it is immaterial whether the fraud relates to the consideration or to the execution of the contract.

The failure to rescind a fraudulent sale does not operate as a waiver of the right to treat the sale as fraudulent, but the defrauded buyer may affirm the contract and recoup in damages if sued by the vendor.

The purchaser of a stock of goods cannot avoid the sale on the ground of fraud, in that false representations were made to him as to the quantity, quality and value of the goods, when there was no fiduciary relation between the parties, and when it was in the purchaser's power to readily determine the truth or falsity of such representations by an inspection of the goods.

One who stands by while fraudulent representations concerning certain goods are made is not bound thereby, though he subsequently by assignment acquires the interest of the one making the false representations, in the price of the goods, when such person at the time of the misrepresentations was not interested in the goods nor a party to the negotiations then pending, nor acting in collusion with his assignor, nor aiding in any attempt to defraud the purchaser of the goods, nor bound to take note of the misrepresentations by reason of his relation to the parties or interest in the subject matter of the sale.

Appeal from Superior Court, Whatcom County.—Hon. H. E. HADLEY, Judge. Affirmed.

Newman & Howard, for appellants.

Dorr & Hadley, for respondent.

The opinion of the court was delivered by

GORDON, J.—This action was commenced for the foreclosure of two mortgages, one a chattel, the other a real

19	686
26	582
19	686
27	508

19	686
29	833
19	686
35	321

19	686
38	431
38	560

19	686
39	94

19	686
40	161

19	686
44	36
41	215

Aug. 1898.] Opinion of the Court—GORDON, J.

estate, mortgage, both of which were made to secure the payment of a note for \$4,800, and interest, which was given by the defendants in part payment of the purchase price of a stock of dry goods and clothing. The defendants in their answer alleged fraud by reason of which they were induced to purchase the stock. To this plea and counterclaim the court sustained a demurrer, and, the defendants electing to stand thereon and refusing to amend, judgment was given for the plaintiff, and defendants have appealed.

It appears from the answer that the defendants are husband and wife, residing at New Whatcom, in this state; that in October, 1896, in the city of Minneapolis, Minnesota, they entered into a contract for the purchase of said stock with G. W. Skinner, who was at that time the owner thereof; that, in the negotiation leading up to the contract, Skinner was also represented and assisted by the firm of Buck & Campbell, his agents at Minneapolis, for the purpose of effecting the sale. These negotiations terminated in the following written agreement:

“This agreement, made and entered into this 6th day of November, A. D. 1896, by and between H. B. Strand of New Whatcom, Washington, party of the first part, and G. W. Skinner of Kussuth county, Ia., party of the second part,

Witnesseth, that for and in consideration of the sum of one (\$1.00) dollar, in hand paid by the said party of the first part, to the said party of the second part, the receipt whereof is hereby acknowledged, and the further consideration of the covenants and agreements on the part of the said party of the first part, hereinafter contained, the said party of the second part hereby agrees to deliver to the said party of the first part, his heirs or assigns, after full payment of the notes herein described, and he has otherwise fully performed his part of this contract, all that certain stock of goods, wares and merchandise as has this day been fully inspected by the said first party, an inventory of which is hereto attached and made a part hereof, free, clear and dis-

charged of all liens, charges, costs or incumbrances of every kind and nature; stocks Nos. 157-161-162 and 163, amounting to eleven thousand (\$11,000) dollars, according to the invoices thereof.

In consideration, therefore, the said party of the first part hereby agrees to pay to the said party of the second part, or order, the further sum of one thousand (\$1,000) dollars, on or before the 1st day of December, 1896; and the further sum of two thousand seven hundred (\$2,700) dollars on or before the 15th day of December, 1896, according to the conditions of two certain promissory notes, bearing even date herewith; one for the sum of one thousand (\$1,000) dollars, due on or before December 1st, 1896, and one for the sum of two thousand seven hundred (\$2,700) dollars, due on or before December 15th, 1896, executed by the said party of the first part hereto, and to deliver to the said party of the second part, a good and sufficient deed of warranty conveying all the certain real property situate in the county of Whatcom, state of Washington, and more particularly described as follows, to-wit:

The E. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of Sec. 17, Town. 40, Range 1, E. and that part of Section 20, Town. 40, Range 1, East, lying north of California creek.

Also W. $\frac{1}{2}$ of S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of Section 10, Town. 40, Range 1, East, state and county aforesaid, free and clear of all incumbrances of whatsoever nature, accompanied by an abstract of title of said real property, extended down to date of delivery, showing the title to be as above stated.

And the said party of the first part agrees to buy the said stock of merchandise and pay for the same at the time and in the manner herein set forth, and does by these presents accept the same in the condition it now is, and at the prices set forth in the said inventories, waiving all claim for damaged goods, shortage and prices, etc.

Time is the essence of this agreement.

Witness our hands and seals this day and year first above written.

Witnesses: M. C. Black, H. B. Strand, [Seal.]
C. A. Campbell. G. W. Skinner. [Seal.]”

It is alleged in the answer that the appellant Strand was

Aug. 1898.]

Opinion of the Court—GORDON, J.

induced to enter into this agreement by reason of certain representations and statements made to him by Skinner and his agents, concerning the character and value of said stock of goods. The representations referred to are alleged to have been as follows:

“Said Skinner then and there further stated that said stock of goods consisted of dry goods, notions and clothing of the value of \$11,000, as shown by a complete and full invoice thereof then in the possession of his said agents, Buck and Campbell; that said invoice was correct in every particular and said stock was reasonably worth the invoiced value thereof; that said stock was practically new, was A. No. 1, first class in every respect and readily salable and merchantable in such retail business as said defendant desired to engage in.”

It is also alleged that all of said statements and representations

“touching the amount, quality, value, character and condition of said stock of goods . . . were knowingly, falsely and wilfully made by said Skinner, with the unlawful and fraudulent intent and purpose of persuading and inducing the purchase of said stock of goods, . . . and for the purpose of deceiving, cheating and defrauding said defendant, . . . and that said stock, instead of being practically new, A No. 1, first class in every respect, readily salable and merchantable and worth the invoiced value thereof, was at said time very old, much shelf worn, badly faded, moth-eaten, unsalable and unmerchantable, and not worth over twenty per cent. of its invoiced value, all of which the said Skinner at the time well knew.”

In accordance with the written agreement above set out, the defendants executed and delivered to Skinner their promissory notes for \$1,000 and \$2,700, respectively, due on December 1st and 15th, respectively, 1898, and also executed and delivered to Skinner their deed of conveyance of real estate described in said agreement. It also appears

in the answer that the defendants were unable to pay said notes as they matured, and the stock continued in possession of Skinner at Minneapolis. It also appears that plaintiff was the owner of the warehouse in which the goods were stored at the time when the written agreement heretofore set out was entered into at Minneapolis between the defendants and Skinner; that both before and after the execution of said agreement of November 6, 1896, the plaintiff herein was fully acquainted and conversant with all the matters and things pertaining thereto. It further appears that about February 1, 1897, plaintiff went to New Whatcom and represented to the defendants that he "was the sole owner of the agreement" (above set out), and was the "sole owner and holder of the two promissory notes" executed and delivered by the defendants to Skinner as aforesaid," and was the sole owner and holder of all that stock of goods referred to in said agreement of November 6th, and that he, the said Griffith, became the sole owner and holder of all of said property, and of all the interests and rights of said Skinner therein, by purchase, assignment and delivery of, from and by said Skinner." It appears, also, that about that time, viz., early in February, 1897, the defendants borrowed from the plaintiff the sum of \$500 for the purpose of paying off an incumbrance which was upon a part of the real estate theretofore conveyed by them to Skinner. The amount at that time owing by the defendants was estimated to be \$4,800, which was made up of the two notes aggregating \$3,700 and interest, \$500 cash advanced by the plaintiff, and certain expenses incurred by him. On February 15, 1897, the following written agreement was entered into between the parties hereto, viz.:

"This instrument witnesseth: That

Whereas, the undersigned, J. M. Griffith, of Minneapolis, Minnesota, and H. B. Strand and Josephine M. Strand, his wife, of New Whatcom, Washington, have entered into

Aug. 1898.]

Opinion of the Court—GORDON, J.

certain agreements whereby, among other things, E. W. Purdy of New Whatcom, Washington, is constituted and appointed as the agent respectively of said parties, and

Whereas, the said J. M. Griffith is the owner and in possession of a certain stock of goods, wares and merchandise, consisting of dry goods, notions, clothing, etc., the same being now in the city of Minneapolis, Minnesota, and more specifically described in the invoice of the same, a copy of which invoice is hereto attached, and

Whereas, the said J. M. Griffith has agreed to sell and deliver the same to the said H. B. Strand and Josephine M. Strand, the said Strand and wife to pay the freight thereon from Minneapolis, such delivery to be contemporary with the delivery by the said H. B. Strand and Josephine M. Strand of a chattel mortgage upon the same, which chattel mortgage is hereto attached, referred to and made a part hereof, and also contemporary with the delivery as a further condition of said sale by the said H. B. Strand and Josephine M. Strand at the same time of that certain mortgage upon real estate, of even date herewith, which mortgage is to be delivered to the said J. M. Griffith as additional security for the unpaid purchase money for said stock of goods, said last named mortgage being hereto attached.

Now, therefore, this instrument is hereby executed and delivered to the said E. W. Purdy, together with said mortgages as aforesaid, with the understanding and agreement and with the instruction to the said E. W. Purdy that the said stock will be shipped by the said J. M. Griffith to the said E. W. Purdy, as the agent of the said J. M. Griffith, and that upon the receipt of the same by the said E. W. Purdy at New Whatcom, Washington, that he is forthwith to place the said stock, or cause the same to be placed in the store room of the said H. B. Strand, situate on Elk street, in the city of New Whatcom, Washington, on lot eleven (11), in block fifty (50), according to the plat of the town of New Whatcom, as filed for record in the office of the auditor of Whatcom county, Washington; and when the same is placed therein, that the said E. W. Purdy is to deliver the possession thereof to the said H. B. Strand and Josephine M. Strand, his wife, provided the freight aforesaid shall have been paid by said Strand and wife, and

provided that contemporary and simultaneously with such delivery the said E. W. Purdy is also to deliver to the firm of Dorr & Hadley, as attorneys of the said J. M. Griffith, the two said mortgages hereto attached, as mortgages to the said J. M. Griffith, the same being delivery to him, and after the delivery of said stock of goods and the delivery of said mortgages as aforesaid, the said E. W. Purdy is to act as the collecting, receiving and remitting agent of the said J. M. Griffith of the proceeds of the sales from said stock, to whom all of said proceeds are to be daily paid over by the said H. B. Strand and Josephine M. Strand, his wife. It being further understood and agreed that the said E. W. Purdy is to receive as compensation for his services as such collecting and remitting agent, of one per cent. upon all moneys so collected by him, the same to be deducted from the amounts so collected, which deduction he is hereby authorized to retain from said collections in payment of his said services, the proceeds remaining in his hands after such deductions to be remitted by him to the said J. M. Griffith and applied upon the note secured by said mortgages; but the said J. M. Griffith is not to be charged with the amount so retained by the said E. W. Purdy.

In addition to the provisions contained in said chattel mortgage, it is understood and agreed by the parties hereto that the said H. B. Strand may, if in the course of his business it may seem best so to do, exchange goods from said stock for produce or other valuable articles of trade which can immediately be turned into money to good advantage or to better advantage than the said stock not to exceed the amount of two hundred dollars (\$200) at any one time.

It is further agreed that at all times the said E. W. Purdy, as the agent of the said J. M. Griffith, shall have the privilege of inspecting said stock and checking the same with the invoice thereof, and of satisfying himself of the proper fulfillment of the provisions in said chattel mortgage contained, on the part of the said H. B. Strand and Josephine M. Strand, his wife, but the said J. M. Griffith shall not sustain any expense or charges occasioned thereby, the same, if any should occur, to be paid by the said H. B. Strand and Josephine M. Strand, his wife.

Aug. 1898.] Opinion of the Court—GORDON, J.

In testimony whereof, the parties hereto have hereunto set their hands and seals this 15th day of February, A. D. 1897.

Signed, sealed and delivered
 in presence of[Seal.]
[Seal.]
[Seal.]”

The mortgages referred to in the preceding agreement are the mortgages which are sought to be foreclosed in the present action. The answer alleges

“that prior to making the said agreement of February 15, 1897, between plaintiff and defendants, the plaintiff was questioned by defendant, H. B. Strand, as to the condition of said stock of goods, and was by the plaintiff assured that said stock was of the amount and character heretofore described, and was in the same condition that it was at the time of the making of said contract between said Skinner and defendant; and relying upon such assurance and the representations theretofore made by said Skinner, as aforesaid, these defendants entered into the said agreement of February 15th, and executed their said note [for \$4,800] and mortgages sued on and sought to be foreclosed in this action.”

Continuing, the answer shows that the stock was delivered to the defendants at New Whatcom about March 15, 1897, when, upon inspection, they learned for the first time of its condition.

Respondent urges that, under the rule which presumes that all oral agreements merge into the written one, it must be presumed that the contract of November 6, 1896, between Skinner and the appellant speaks the truth. That agreement sets forth that the goods, wares and merchandise have been “fully inspected by the said first party;” also that Strand waives “all claims for damaged goods, shortage and prices.” The position of the respondent is that the fraud which will enable a party to avoid a written

contract, or to vary or contradict its terms, must relate to the *execution* of the contract itself, and there is some authority for the position. *Mitchell v. Universal Life Ins. Co.*, 54 Ga. 289; *Angier v. Brewster*, 69 Ga. 362. But we think the better rule, and the one which is supported by the great weight of authority, is stated by Mr. Bigelow in his work on the Law of Fraud (p. 175), as follows:

“Though there be a written contract between the parties, this . . . does not preclude parol proof of fraudulent representations made at the same time as an inducement to making it; and *this whether the representations relate technically to the execution of the contract*, so that *non est factum* could be pleaded at law, or not.”

In a foot note the author states that it is an entire mistake to say that the fraud must relate to the execution of the contract. See, also, *Hoitt v. Holcomb*, 23 N. H. 535; *Race v. Weston*, 86 Ill. 91; *Mayer v. Dean*, 115 N. Y. 556 (22 N. E. 261); *Amer v. Hightower*, 70 Cal. 440 (11 Pac. 697).

In *Hoitt v. Holcomb*, *supra*, it is said that the fraud must relate “to a point material to the contract, but it is immaterial whether it relates to the consideration or the execution of the contract.”

It is next urged that, inasmuch as appellants never sought a rescission of the contract or offered to return the property, or made any objection prior to the filing of the answer, they should be held to have waived any right which may have existed to treat the sale as fraudulent; and numerous authorities are cited by counsel in support of this contention. But an examination of them discloses that they are all cases wherein rescission was claimed or attempted. They therefore are not in point, for here the appellants do not seek a rescission. On the contrary, as disclosed by their answer, they have affirmed the contract and seek to recoup the damages sustained by them from having been led into it. Such

Aug. 1898.]

Opinion of the Court—GORDON, J.

a course is sanctioned by all of the authorities. In 8 Am. & Eng. Enc. of Law, p. 819, the rule is thus stated:

“The defrauded buyer may, instead of rescinding the contract, stand to the bargain, even after he has discovered the fraud, and recover damages therefor, or recoup in damages, if sued by the vendor; for the affirmance of a contract by the vendee, after discovery of the fraud, merely extinguishes his right to rescind. . . .”

We come now to a more serious objection, which is urged to the answer. The question which it raises may be thus stated: Do the representations and inducements, which are alleged to have been made and relied upon, relate to matters of fact, upon which the defendants could place reliance, or to matters of opinion and judgment, concerning which the law required the defendants to judge for themselves? It must not be forgotten that the contracting parties were dealing at arm's length. No fiduciary relations existed between them—nothing to inspire confidence or disarm suspicion—and there was no imbecility of age, weakness or disease. The property in question was at hand, and an inspection of it by the defendants could have been made had they insisted upon it. The representations related solely to quantity, quality and value, the truth or falsity of which could have been determined by an inspection. Under such circumstances, we think it will not do to hold that a party may successfully complain of his own failure to exercise ordinary care, prudence and caution, when, by the exercise thereof, the injury of which he complains could not have arisen. The principle underlying the present discussion has been repeatedly announced by this court, and must, we think, be regarded as settled. In *Washington Central Imp. Co. v. Newlands*, 11 Wash. 212 (39 Pac. 366), this court said:

“If people having eyes, refuse to open them and look, and having understanding refuse to exercise it, they must

not complain, when they accept and act upon the representations of other people, if their venture does not prove successful. Written contracts would become too unstable if courts were to annul them on representations of this kind."

In *West Seattle Land & Imp. Co. v. Herren*, 16 Wash. 605 (48 Pac. 341), it was held that representations made by a vendor to induce a purchaser to buy, although false, were not grounds for rescission, when the truth or falsity of them could have been readily ascertained by the purchaser by investigation on his part. In our judgment, no sufficient excuse is advanced by defendants for their omission to inspect the goods prior to entering into the contract of November 6th, and we are bound to conclude that, if the present action were by Skinner, with whom the defendants originally dealt, and who was the vendor under the contract of November 6, 1896, the defense here interposed could not avail.

But even if it should be held that, as against Skinner, were he plaintiff, the answer would be sufficient, it in no wise follows that it is such as against the present plaintiff. There is not an allegation in the answer which connects plaintiff with any fraud practiced by Skinner. True, the answer asserts that he was present when different conversations occurred between Skinner and the defendants, but it is not pretended that he was interested in the goods at that time, or that he was a party to the negotiations that were then pending, or that he was acting in collusion with Skinner, or assisting him in any attempt to defraud the defendants, or bound, by reason of his relations to the parties or interest in the subject matter of their conversation, to take note thereof; and it affirmatively appears from the answer that Skinner had parted with all interest in this stock of goods prior to the execution of the note and mortgages which are the subject of the present action. The new agreement which was entered into was between new parties. It

Sept. 1898.]

Syllabus.

was complete in all its terms and details, and, giving the answer the most liberal interpretation permissible under the rules of good pleading, its allegations fall short of showing such fraud on the part of the present plaintiff as would enable defendants to avoid the contract or recover damages for its enforcement. The allegation that prior to the making of the agreement of February 15, 1897, between plaintiff and the defendants, plaintiff was questioned by the defendants as to the condition of said stock of goods, and they were assured that it was in the same condition that it was at the time of making said contract between Skinner and the defendant, cannot avail the defendants, for it is not shown that such representation was false. Indeed, the contrary is fairly inferable from the answer itself.

Viewed in its most favorable light, we think the answer insufficient, and the demurrer was properly sustained. Affirmed.

REAVIS, ANDERS and DUNBAR, JJ., concur.

[No. 2630. Decided September 2, 1898.]

TERESA ELDRIDGE, *Appellant*, v. JOHN H. STENGER
et ux., *Respondents*.

19	697
38	208

APPEAL—SERVICE OF NOTICE—*LIS PENDENS*—EXECUTION BY ATTORNEY—WHEN UNEFFECTIVE AS NOTICE.

The rule requiring service of notice of appeal on all parties who do not join in the appeal does not apply in cases where one named as a party has never in any way appeared in the action.

A *lis pendens* notice may properly be signed by the attorney of the party desiring to file it as well as by the party himself.

Under Laws 1893, p. 413, providing that every person whose conveyance or incumbrance is executed or recorded subsequently to the filing of *lis pendens* notice shall be deemed a subsequent

purchaser or incumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were a party to the action, one who has taken a mortgage with knowledge of an outstanding unrecorded deed of the premises cannot bind the holder of the unrecorded deed by filing notice of *lis pendens* upon the institution of a suit to foreclose his mortgage.

Appeal from Superior Court, Whatcom County.—Hon. JOHN R. WINN, Judge. Reversed.

Dorr & Hadley, for appellant.

Maxwell & Romaine, and *Fairchild & Bruce*, for respondents.

The opinion of the court was delivered by

ANDERS, J.—The respondents move to dismiss this appeal upon the grounds that the appeal was not taken in accordance with the statute, and that this court has therefore no jurisdiction of the subject matter. The particular objection is that the defendant J. J. Bell was not served with notice of the appeal; but it appears from the record that he never in any way appeared in the action, and therefore no service of the notice upon him was required. The motion must be denied.

This action was brought by the appellant, Teresa Eldridge, to enjoin the respondent John H. Stenger from further proceeding in an action in the superior court of Whatcom county to foreclose a mortgage executed by Hugh Eldridge and Edmund Cosgrove and wife to the respondent Stenger in June, 1892, upon certain real estate in Whatcom county, described as all that part of the east half of the Edward Eldridge donation claim lying west of Squalicum creek, to which action appellant was not made a party, and to restrain said respondents from asserting any interest in or to said premises. Other parties were joined as defendants in this action, but they all defaulted, the Stengers be-

Sept. 1898.] Opinion of the Court—ANDERS, J.

ing the only real parties in interest. The land in controversy is a part of the Edward Eldridge donation claim settled upon by him and his wife in the year 1853. Edward Eldridge, who was the husband of appellant, died on October 12, 1892. In the year 1891 the said Edward Eldridge concluded to convey the land in question, together with other real estate, to the appellant, and, in order to effectuate his determination, he, together with his wife, Teresa Eldridge, on April 28, 1891, conveyed the land to their son, Hugh Eldridge, for the purpose of having him convey the same to his mother. This deed was recorded on or about the 29th day of April, 1891. At that time the grantee named therein was absent from home, and had no knowledge of the transaction. After Hugh returned, his father delivered to him this deed, with instructions to convey the property described therein to his mother, the present appellant. On August 7, 1891, Hugh prepared a deed in pursuance of said instructions, and on the 30th day of November following executed and delivered the same to his mother. There was no consideration for either of these deeds, though a money consideration is stated in each of them. This deed to Mrs. Eldridge was not recorded until October 1, 1895. Sometime in June, 1892, Hugh Eldridge and Edmund Cosgrove, being the owners of the controlling interest in the Fairhaven & New Whatcom Street Car Company, entered into an agreement with respondent John H. Stenger to purchase the majority of the capital stock of another street railway company in New Whatcom, owned by said Stenger. The price agreed to be paid for this stock was \$45,000, \$10,000 to be paid in cash, \$10,000 in six months, and the balance, \$25,000, in one year, the deferred payments to be evidenced by promissory notes secured by mortgages upon real estate. At the time the purchase and sale of this stock was consummated the stock was in the pos-

session of the Puget Sound Loan, Trust & Banking Company, and was, it appears, held as collateral security for the payment of Stenger's indebtedness to that and the Bellingham Bay National Bank. And it seems to have been understood between Mr. Stenger and the banks that the securities received from Eldridge and Cosgrove should be held in lieu of the railway stock. Between the seventh and thirteenth days of June, 1892, there was a meeting of all parties interested in the stock transfer in the private office of the Puget Sound Bank, a small room adjoining, and opening out of, the main banking room, for the purpose of determining what property was to be included in the mortgages to be given by Eldridge and Cosgrove. There were present at that meeting the respondent John H. Stenger, F. C. Pettibone, president of the Puget Sound Bank, C. D. Francis, cashier of the Bellingham Bay National Bank of New Whatcom, Hugh Eldridge, Edmund Cosgrove and E. B. Leaming, the attorney of the two last named persons. Several city lots were proposed by Cosgrove and included in the mortgage, and various pieces of real estate were submitted by Eldridge, some of which were rejected for the reason that it appeared that he owned but an undivided interest therein. Finally Eldridge proposed to include in the mortgage that part of the Edward Eldridge donation claim above mentioned, and this was accepted by Stenger and the representatives of the bank, and the mortgage was accordingly prepared embracing that property. This mortgage was executed and delivered on June 13, 1892, but was withheld from record at the instance of Eldridge and one James W. Morgan until March 11, 1893. The \$10,000 mortgage was fully paid, but the mortgagors were able to pay but \$5,000 on the \$25,000 mortgage, and on November 13, 1894, the mortgagors, John H. Stenger, commenced an action to foreclose the same. On February 27 judgment was rendered against Eldridge and Cosgrove for the amount due upon

Sept. 1898.]

Opinion of the Court—ANDERS, J.

their note, and a decree of foreclosure entered directing the mortgaged property to be sold in satisfaction of such judgment. On February 26, 1896, the complaint in this action was filed, and the summons was served upon the respondent Stenger the same day. After the decree in the foreclosure suit was entered, execution issued thereon and placed in the hands of the sheriff, and the property advertised for sale, the appellant, by leave of the court, filed a supplemental complaint setting up those facts, making J. J. Bell, sheriff of Whatcom county, a party, and asking that he be enjoined from proceeding with the sale. After issues joined, the cause was tried by the court and judgment and decree rendered against the appellant, dismissing her complaint and enjoining her from asserting any claim or interest in or to the land in controversy. To reverse this judgment and decree this appeal is prosecuted.

Several errors are assigned and relied on by the appellant, but, in our view of the case, it is only necessary to consider two questions. The first is whether the respondent Stenger had notice of the appellant's title to, or interest in, the mortgaged premises at the time he received his mortgage, and the second is as to the effect of the filing of the notice of *lis pendens* in the foreclosure action. The court found as a fact that the defendant John H. Stenger had no notice of the existence of the deed to the plaintiff prior to its filing and recording in the auditor's office, and, prior to that date, had no knowledge that the plaintiff, Teresa Eldridge, had or claimed any right or interest in or to the premises in controversy. The appellant duly excepted to this finding, and it therefore becomes the absolute duty of this court, under the statute, to examine the evidence upon that proposition *de novo*, and to determine the fact in accordance with the record. It is strenuously contended by counsel for the appellant that this finding of the court is

clearly contrary to the evidence and constitutes palpable error on the part of the trial court. All of the parties who were present at the meeting at the bank testified upon this point at the trial in the court below. Four of them, viz., Eldridge, Cosgrove, Francis and Leaming, testified positively to the effect that Hugh Eldridge at that time and in the hearing of all parties, stated to Stenger that, while the property stood in his name upon the records, it had been deeded by him to his mother, but the deed had not been recorded and he could keep it off the records until such time as the indebtedness to Stenger should be settled; it being understood at that time by all parties that the indebtedness would be paid before the notes and mortgages became due. Mr. Pettibone, a witness for the respondents, and one of the parties who was present at this meeting, testified that he did not hear this statement, or anything in regard to Mrs. Eldridge's ownership of the property; but he also stated that he did not remember the conversation that took place at that time, and that he passed back and forth from the room to the bank during the time of the meeting, and that the conversation might have occurred and he not have heard it. But Mr. Stenger positively denies that any such statement was made to him, or that he had any notice whatever either of Mrs. Eldridge's deed or any claim whatever upon her part to the mortgaged premises. The learned counsel for the respondents admit that these four witnesses testified positively as to the ownership of this property being in Mrs. Eldridge, but insist that the testimony is not worthy of belief and especially claim that the testimony of Eldridge should be entirely disregarded, because he had admitted that he claimed this property as his own when being interrogated in open court as to his qualification to become bail for a certain person, and that he stated on his examination in this case that he did not claim in the

Sept. 1898.] Opinion of the Court — ANDERS, J.

foreclosure suit that he and Cosgrove were not indebted to Mr. Stenger upon their promissory note, which latter statement is contrary to the answer filed and verified by him in that proceeding. Counsel also claim that the testimony of Mr. Leaming, the attorney of Eldridge in the foreclosure proceeding, should also be discredited because of the fact that he drafted the defendants' answer and filed various dilatory motions, etc., in the cause. But it seems to us that the acts done by this witness in that case, however they might be considered from a purely ethical point of view, are not sufficient to impeach his credibility as a witness. Mr. Leaming certainly has no interest in this case, at least none that the court can discover, and the same may be said of Cosgrove and Francis; and, if the testimony of these four witnesses were all the testimony in the record, we would feel constrained, under the circumstances, to hold that the respondent had notice of appellant's title when he took the mortgage from Eldridge and Cosgrove. But it appears from the testimony of James W. Morgan, who was president of the Bellingham Bay National Bank, that at about the time the mortgage was executed Mr. Stenger came into the bank, and that he, Morgan, expressed surprise that Hugh Eldridge should mortgage his mother's property, even although it was understood that the mortgages would be but temporary, and that Mr. Stenger remarked that his claim would doubtless be taken care of shortly anyway. In addition to this, one Keith, who testified by deposition in California, stated that Mr. Stenger admitted to him some time in 1894 that he knew Mrs. Eldridge owned the mortgaged property, but that he was secured anyway, because he had a contract from James W. Morgan to hold him harmless against any subsequent mortgages or conveyances of the property; and the fact was that Mr. Stenger had such an agreement from Mr. Morgan.

It is also claimed by the counsel for respondents that the testimony of Francis and Morgan was impeached at the trial. It appears clear to us, however, that the effort at impeachment was entirely unsuccessful. From the whole record, therefore, we are constrained to hold that respondent Stenger accepted his mortgage with notice of appellant's deed.

This brings us to the remaining question, which is, what was the effect of the notice of *lis pendens* which was filed in the foreclosure suit on November 13, 1894? The notice which was filed contained a statement of all the facts required by the statute. The counsel for appellant objects to the consideration of the notice for the reason that it was signed by the plaintiff's attorneys and not by the plaintiff. While the statute provides that the plaintiff in a proper action may file such notice, we think the common practice is, and has been, for the notice to be signed and filed in fact by the attorney of the party desiring to file it. See *Estee's Pleadings*, title *Lis Pendens*. Our statute (Laws 1893, p. 413) provides that

"From the time of the filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were a party to the action."

It will be borne in mind that the notice in this instance was filed prior to the recording of appellant's deed, and it is insisted by counsel for the respondents that this statute precludes the appellant from claiming any interest in the premises in dispute. It is asserted that under the statute the plaintiff cannot occupy any attitude other than that of a subsequent purchaser, and that is manifestly true:

Sept. 1898.] Opinion of the Court — ANDERS, J.

but the provision that such subsequent purchaser shall be bound by the proceedings to the same extent as if he were a party to the action must also be considered in construing the statute. Now, conceding that Mrs. Eldridge was a subsequent purchaser, in contemplation of this statute, and bound to the same extent as if she had been a party to the action to foreclose the mortgage, what would have been the effect upon her rights had she been made a party to that action? If she had been a party and it had transpired that this mortgagee had notice of her prior unrecorded deed at the time the mortgage was executed and delivered, could it be claimed that her rights would have been destroyed and her deed held for naught? We think not. This statute seems to have been copied from the statute of New York, and we have seen none like it elsewhere, and the courts of that state have held that the title of a purchaser holding under a prior unrecorded conveyance, if made a party, could not, under such circumstances, be affected when the plaintiff at the time of filing the notice of *lis pendens* had actual or constructive notice of his rights. This question was elaborately discussed and determined in accordance with our views of the statute in the case of *Lamont v. Cheshire*, 65 N. Y. 30.

For the foregoing reasons the judgment is reversed and the cause remanded, with directions to enter a decree in favor of the plaintiff enjoining the respondents from selling or offering for sale the premises described in the complaint, or from asserting any right or title in or to said premises by virtue of the mortgage aforesaid.

DUNBAR, GORDON and REAVIS, JJ., concur.

[No. 2848. Decided May 21, 1898.]

THE STATE OF WASHINGTON, *Appellant*, v. JOHN B. ARMSTRONG,
Respondent.

Appeal from Superior Court, Kittitas County.—Hon. JOHN B. DAVIDSON, Judge. Appeal dismissed.

Kirk Whited, Prosecuting Attorney, for The State.

Graves & Englehart, for respondent.

Per Curiam.—Under the authority of *State v. Hubbell*, 18 Wash. 482 (51 Pac. 1039), this appeal will be dismissed, for the reason that the error alleged is one affecting the acquittal of the defendant on the merits.

[No. 2849. Decided May 21, 1898.]

STATE OF WASHINGTON, *Appellant*, v. ED. HERON, *Respondent*.

Appeal from Superior Court, Kittitas County.—Hon. JOHN B. DAVIDSON, Judge. Appeal dismissed.

Kirk Whited, Prosecuting Attorney, for The State.

Per Curiam.—Under the authority of *State v. Hubbell*, 18 Wash. 482 (51 Pac. 1039), this appeal will be dismissed, for the reason that the error alleged is one affecting the acquittal of the defendant on the merits.

[No. 2837. Decided May 27, 1898.]

GEORGE W. FISHER *et al.*, *Appellants*, v. GEORGE B. KITTINGER,
Respondent.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Reversed.

Ira Bronson, for appellants.

Sept. 1898.]

Opinion Per Curiam.

Per Curiam.—The only point involved in this appeal was expressly decided by the court in the case of *Bettman v. Cowley*, *ante*, p. 207 (53 Pac. 53); but after the judgment herein was rendered, and upon the authority of that case, this judgment is reversed, and the cause remanded for further proceedings accordingly.

[No. 2958. Decided May 31, 1898.]

WILLIAM JAMES, *Respondent*, v. THOS. W. PROSCH *et ux.*, *Appellants*.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

Alex. R. Jones, for appellants.

Per Curiam.—By reason of the rule announced in *Swainburne v. Mills*, 17 Wash. 611 (50 Pac. 489, 61 Am. St. Rep. 932), the judgment in this case will be affirmed.

[No. 2828. Decided September 17, 1898.]

DAVID BETTMAN, *Appellant*, v. H. T. COWLEY, *Respondent*.

Appeal from Superior Court, Spokane County.—Hon. W. G. LANGFORD, Judge. Reversed.

Will G. Graves, for appellant.

Blake & Post, for respondent.

Per Curiam.—It being stipulated by the parties that the question presented in this case is similar to the one decided in *Bettman v. Cowley*, *ante*, p. 207 (53 Pac. 53), the judgment of the lower court is therefore reversed.

[No. 2870. Decided September 17, 1898.]

M. GOTTSTEIN *et al.*, *Respondents*, v. KATHARINE WIST, *Appellant*.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

Ballinger, Ronald & Battle, for appellant.

Allen & Allen, for respondents.

Per Curiam.—It being stipulated by the parties that the question presented in this case is similar to the one decided in *Hemrich v. Wist*, *ante*, p. 516 (53 Pac. 710), the judgment of the lower court is therefore affirmed.

INDEX.

ACCESSORIES. SEE CRIMINAL LAW, 20.

ACCOUNT STATED.

Implied Assent of Party to be Charged. The fact that a statement of account had been delivered to defendant and the same retained a long time without objection, would not make it an account stated determining the amount due from defendant, when there was no liability existing on the defendant's part.—*Davis v. Seattle National Bank*,..... 65

ACTIONS.

1. *Action on Bond—Leave of Court.* In an action upon an official bond by the agents of the state solely for the benefit of the state, leave of court to prosecute the action is not necessary, under Code Proc. § 696, requiring leave of court to be first obtained before the commencement of an action by a plaintiff other than the state, since an action by state agents solely for its benefit is virtually an action by the state.—*Nye v. Kelly*..... 73
2. *Same—Action for Benefit of State—When may be had in Name of Officer.* Under Laws 1891, p. 355, § 7, providing that all suits necessary to protect the rights of the state in matters or property connected with the penitentiary and its management shall be prosecuted in the name of the board of state penitentiary directors," such directors, acting in their official capacity, may bring an action in their own names for the benefit of the state upon the official bond of the warden to recover on account of his defalcation of public funds.—*Id.*..... 73

See APPEAL, 12; ASSIGNMENT; JUDGMENT, 4.

ALIENS.

1. *Ownership of Lands by Corporations Composed of Aliens—Constitutional Law.* Under the constitutional provision prohibiting alien ownership of lands in this state and declaring that every corporation, a majority of whose stock is owned by aliens, shall be deemed an alien for the purposes of such prohibition, conveyances to a corporation, a majority of

ALIENS—CONTINUED.

- whose stockholders are aliens, may be avoided at the suit of the state, although at the time the conveyance was made a majority of the stockholders may have been citizens of the United States.—*State, ex rel. Winston v. Hudson Land Co.*..... 85
2. *Same — Lease of Lands.* A lease of lands to an alien for the period of forty-nine years is void under the constitutional prohibition against alien ownership of lands, since such persons cannot be allowed to accomplish indirectly that which they are forbidden to do directly.—*Id.*..... 85

APPEAL.

1. *Supersedeas Bond.* On appeal from a judgment quashing an alternative writ of prohibition, a bond conditioned as a supersedeas does not operate as a suspension of the judgment.—*State, ex rel. Barnard v. Board of Education*..... 8
2. *Power of Supreme Court to Issue Supersedeas.* The supreme court has jurisdiction to issue an order of supersedeas to preserve the *status quo* of parties pending the determination of an appeal on its merits, under art. 4, § 4, of the constitution, giving the supreme court power to issue all writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction, when for want of such an order the appeal may be rendered of no avail to appellant and the court's control of the appeal rendered ineffective.—*Id.*..... 8
3. *Authority of Attorney to Take.* A receiver of an insolvent bank, who appears of record also as an attorney for the bank itself, may prosecute an appeal for the bank, when no question as to his authority to appear as such attorney has been raised in the lower court.—*Hallam v. Tillinghast*..... 20
4. *Settlement of Statement of Facts.* The settlement of a statement of facts by a judge after his term of office has expired is not ground for striking the statement, when it has also been certified by the successor of the judge who tried the cause.—*Rauh v. Scholl*..... 30
5. *Extension of Time for Filing Briefs.* An extension of time given appellant by stipulation, in which to file his brief, would not excuse respondent from filing his answering brief within the time prescribed by the rules of court, unless an extension of time had also been accorded the latter by stipulation.—*Carlson Bros. & Co. v. Van de Vanter*..... 32

APPEAL—CONTINUED.

6. *Review of Verdict—Sufficiency of Evidence.* The appellate court will not disturb the verdict, where the testimony is conflicting, and there is evidence of a substantial character sustaining the verdict, especially after a motion for a new trial has been presented to the lower court and denied.—*Selber v. Springbrook Trout Farm*..... 49
7. *Same.* The verdict of the jury will not be disturbed on appeal, where the evidence is substantially conflicting, and the lower court has declined to grant a new trial on the ground that the evidence does not justify the verdict.—*McDougall v. Walling*..... 80
8. *Weight of Evidence.* The findings of the trial court will not be disturbed on appeal, when the evidence is conflicting, unless the weight of evidence is clearly against the findings. — *Washington Dredging & Imp. Co. v. Partridge*..... 62
9. *Time of Filing Notice.* Jurisdiction to hear an appeal is not conferred upon the supreme court where the appellant does not file his notice of appeal in the clerk's office until seven days after its service on respondent, when the statute requires that such filing should be made within five days after service. — *State v. Butler*..... 110
10. *Costs in Lower Court—Question Not Raised Below.* The supreme court will not consider and determine the right of a party to an allowance for costs incurred in the lower court, when the lower court has never been called upon to pass upon the question.—*Jenkins v. Powe*..... 113
11. *Estoppel Against Changing Theory of Case.* Where an appeal has been taken from the order of the court granting defendants a new trial upon the application of one of the defendants, if the appellant does not on appeal raise the question that the grant of new trial applies only to the defendant moving therefor, but litigates the case in the supreme court on the theory that the order applied to all the defendants and the defendants all appear and resist his appeal, he is estopped from afterwards raising the question in mandamus proceedings that only the party moving for the new trial is entitled to the benefit of the order granting one. — *State, ex rel. Holgate v. Superior Court*.... 114
12. *Damages—Action on Bond.* Where it cannot be determined from the record what amount of damages respondent is entitled to recover for the detention of property pending an appeal, held by appellant by virtue of a supersedeas bond,

APPEAL—CONTINUED.

- no damages will be allowed in giving judgment against appellant, but the respondent will be left to an action upon the bond.—*Blair v. Cassin*..... 127
13. *Briefs*. Appellant's brief will be stricken from the files, when it fails to comply with the supreme court rule requiring references therein to the pages of the record for verification, except in cases where the record is not very extensive.—*Washington Mill Co. v. Sprague Lumber Co.*..... 165
14. *Notice—Parties*. The failure to serve intervenors who have appeared in a cause with notice of appeal is ground for dismissal of the appeal, even though the intervenors have been permitted to dismiss their complaint in intervention after the appeal was taken.—*Old National Bank v. O. K. Gold Mining Co.*..... 194
15. *Appealable Order*. An order sustaining demurrers to several affirmative defenses while other affirmative defenses and a general denial are left unaffected by the ruling, is not an appealable order, since such ruling does not in effect determine the action, and such questions can be reviewed on appeal from final judgment in the cause.—*Id.*..... 194
16. *Pendency of Appeal—When Jurisdiction Ceases*. A cause on appeal to the supreme court of this state remains pending, and within the jurisdiction of the court to make any modification of its decision, until the final judgment has been rendered and the remittitur issued thereon.—*State v. Tugwell*..... 238
17. *Objections Not Raised Below*. An objection that the pleadings do not show that a tender was kept good cannot be raised for the first time on appeal.—*Moran Bros. Co. v. Northern Pacific R. R. Co.*..... 266
18. *Sufficiency of Evidence*. The verdict of a jury finding that a deed absolute in form is in fact a mortgage will not be disturbed, when there is substantial testimony upon which to base the verdict.—*Snyder v. Parker*... 276
19. *Appealable Order—Order Overruling Motion to Quash*. An order overruling a motion to quash a service of summons is not such a final order as determines the action, and hence is not appealable.—*Prussian National Ins. Co. v. Northwest Fire & M. Ins. Co.*..... 281
20. *Altering Statement After Settlement*. Where a statement of facts as filed, served and settled, contained an exception to an erroneous instruction, and it was a disputed question as

APPEAL—CONTINUED.

- to whether the exception had been taken, the action of the court in granting a motion several months after settlement to strike the exception was unwarranted, when there was no showing of fraud respecting the insertion of the exception.—*Anderson v. Northern Pacific Ry. Co.*..... 340
21. *Briefs.* A brief filed irregularly and out of time by one not an attorney of record in the case will be stricken from the files.—*Id.*..... 340
22. *Joinder in Notice — Jurisdiction of Appeal.* Where a party to an action appeals without serving notice upon his co-defendants, the action of the parties not served in later joining in the appeal bond, but neglecting to join in the appeal by statement filed with the clerk or to serve an independent notice of appeal, will not confer jurisdiction upon the supreme court, under Laws 1893, p. 121. § 5 (Bal. Code, § 6504) governing notice in cases where parties similarly affected desire to appeal.—*Winters v. Gray's Harbor Boom Co.*..... 346
23. *Briefs — Dimensions.* A failure of appellant to conform with the supreme court rule as to dimensions of briefs is ground for striking his briefs, when his reply brief is as objectionable as his opening brief, though his attention was called to the matter by respondent, and no excuse is offered for the violation of the rule — *Von Schrader v. Welcher*..... 349
24. *Divorce — Intervention by State — Right of Appeal.* The state has no right of appeal from the judgment in a divorce proceeding, which was resisted by the prosecuting attorney under authority of the statute providing for his interfering in divorce cases whenever the complaint remains undefended.—*Lee v. Lee*..... 355
25. *Settlement of Statement of Facts — Notice.* Where a notice to respondent that appellant will apply to the judge to settle and certify a statement of facts fails to designate the place where the settlement and certification are to be had, the notice is insufficient, under Laws 1893, p. 114, § 9 (Bal. Code, § 5058), which requires the time and place to be specified in such notices.—*Kroenert v. Gustason*..... 373
26. *Assignment of Errors — Briefs.* When findings of fact questioned by appellant are not printed in his brief, the sufficiency of the findings with reference to the testimony will not be considered by the court.—*Lewis v. McDougall*..... 388
27. *Objections Not Raised Below.* In an action on a bond to recover liquidated damages, an answer denying the execution

APPEAL—CONTINUED.

- of the bond, and also admitting its execution as a bond fixing a penalty instead of liquidated damages, cannot be attacked on appeal, when no objection has been raised on that ground in the lower court.—*Roberts v. Washington Water Power Co.* 392
28. *How Affidavits Included in Record.* Affidavits introduced in the lower court will not be considered on appeal unless included in the statement of facts by certificate of the trial judge.—*Norfor v. Busby*..... 450
29. *Regularity of Proceedings Below—Argument of Counsel.* Although the argument of counsel may be objectionable, it will not be presumed that the jury was misled thereby, when they were admonished by the court to disregard the irrelevant and immaterial statements of counsel.—*Bay View Brewing Co. v. Tecklenberg*..... 469
30. *Conclusiveness of Court's Findings.* The findings of fact by trial court, made in an action at law before it without a jury will not be disturbed on appeal.—*Ryan v. Northern Pacific Ry. Co.*..... 533
31. *Objections to Evidence—Indefiniteness.* When the objections to the introduction of evidence are not definite enough to call the court's attention to the real ground of its inadmissibility, the error cannot be urged on appeal.—*Coleman v. Montgomery* 610
32. *Appealable Order—Default Judgment.* A judgment by default is a final judgment, and appealable, since, under Code Proc., § 193 (Bal. Code, § 4911), objection can be made to the complaint on appeal, if it fails to state facts sufficient to constitute a cause of action.—*Rhode Island Mfg. & Trust Co. v. Spokane*..... 616
33. *Assignments of Error.* Where the only question sought to be raised by appellant is upon the sufficiency of the complaint to sustain the judgment, the allegation set forth in his brief that the complaint does not state a cause of action constitutes a sufficient assignment of error.—*Id.*..... 616
34. *Limitation.* A judgment dismissing an action is a final judgment, and, under Laws 1895, p. 81 (Bal. Code, § 6502), the limitation upon appeal therefrom is ninety days after the date of entry of such judgment, and not the fifteen-day limitation upon all orders other than final orders, provided for by the same statute.—*Seattle, L. S. & E. Ry. Co v. Simpson*..... 628

APPEAL—CONTINUED.

35. *Service of Notice.* Under Laws, 1895, p. 561 § 82, providing that notice of appeal to the superior court from the decision of the board of state land commissioners, as to the prior right to purchase tide lands, must be served upon the respondents, or upon their attorneys, within thirty days after the filing of entry of such decision, service of the appeal notice must be made upon the attorney of record for respondent, and the superior court can take no jurisdiction of an appeal where admission of service of the notice appears to have been made by attorneys for respondent other than the attorney of record.—*Id.*..... 628
36. *Jurisdiction by Consent.* Where a court has no jurisdiction of an appeal the appearance therein or consent of the respondent would not confer jurisdiction.—*Id.*..... 628
37. *Review on Appeal—Sufficiency of Objections Raised by Demurrer.* Although the ground of objection on which a demurrer to a complaint was sustained in the court below may not have been raised there, the ruling will be affirmed on appeal, if it appears that the complaint does not state a cause of action against defendants, and that the insufficiency of the facts stated was raised by demurrer.—*Birmingham v. Cheatham.*..... 657
38. *Service of Notice.* The rule requiring service of notice of appeal on all parties who do not join in the appeal does not apply in cases where one named as a party has never in any way appeared in the action.—*Eldridge v. Stenger.*..... 697
- See CRIMINAL LAW, 8, 9; HIGHWAYS, 1, 2; JUDGES, 1; PLEADING, 10; TIDE LANDS, 2.

ARBITRATION AND AWARD.

1. *Agreement for—Right of Action for Failure—Demand Necessary.* Where a water works plant in an outlying addition has been transferred to a city in consideration of the city's connecting same with, and maintaining it as a part of, its general system of water works, a provision in the contract that the city shall pay on or before a given date, whatever sum certain named officers as an arbitration board may agree upon as further compensation, makes it incumbent on the seller to demand that the arbitrators proceed to arbitrate before the expiration of that date, in order to give him any right of action against the city by reason of their failure.—*Lidgerwood Park Water Works Co. v. Spokane.*.... 365

ARBITRATION AND AWARD—CONTINUED.

2. *Same*—An agreement for arbitration is not void by reason of a stipulation that the finding of the arbitrators should be approved by the city council in order to be binding upon the city, since such provision merely constitutes the council a member of the board of arbitrators. — *Id.*..... 365

ASSAULT—See INDICTMENT AND INFORMATION, 1, 2; RAPE.

ASSIGNMENT.

Rights of Parties — Assignment of Promissory Note. Under the rule that the assignment of a chose in action passes the whole interest of the assignor therein, including every remedy and security available by the assignor as incident thereto, although not specially named in the instrument of assignment, the assignment of a promissory note by an administrator would pass to the assignee a right of action for damages, which had accrued during the lifetime of the decedent by reason of the negligence of a bank, to which the note had been delivered for collection, in failing to notify the indorsers of its non-payment at maturity.—*Munson v. Exchange National Bank*..... 125

See MORTGAGE, 2; SALES, 1.

ATTACHMENT.

1. *When Lies — Equitable Actions.* An attachment may issue in an equitable action, when the object is to recover a specified amount of money, under Bal. Code, § 5350, providing that the plaintiff at the time of commencing an action, or at any time afterward before judgment, may have the property of the defendant attached.—*Bingham v. Keylor*..... 555
2. *Conversion of Partnership Property — Repeal of Statute.* The act of 1854 as amended by Laws 1867, p. 97, making the conversion of partnership funds grand larceny, having been repealed by implication by Laws 1873, p. 251, which omitted such offense and declared that only crimes prescribed therein should be punished, an attachment will not issue on account of the conversion of partnership property, as the statutory provision awarding the writ on the ground of injuries arising from the commission of some felony is inapplicable.—*Id.*..... 555
3. *Same—Fraud.* The action of a partner in collecting debts due the firm and refusing or neglecting to charge himself therewith does not fall within the provisions of Bal. Code,

ATTACHMENT—CONTINUED.

§5351, subd. 8, authorizing attachment, where "the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought."—*Id.*..... 555

4. *Wrongful Attachment—Mitigation of Damages.* In an action against a sheriff for wrongful attachment, he cannot show in mitigation of damages that he had sold the property under chattel mortgage, while in his possession under the attachment levy, when notices of sale have not been posted according to the statutory requirements necessary to make the foreclosure legal; nor could the costs of such illegal foreclosure be deducted from the value of the property.—*Chezum v. Parker* 645

ATTORNEY AND CLIENT.

Attorneys' Fees. Where an attorney's fee is provided for in terms in a note or mortgage the same must be allowed by the court regardless of its reasonableness, if the instrument was executed prior to the taking effect of the law permitting the court to fix such amount as it may deem reasonable. (Laws 1895, p. 81, Bal. Code, §5166.)—*Gordon v. Decker*..... 188

See *APPEAL*, 3, 21; *LIS PENDENS*, 1; *MORTGAGES*, 12.

BANKS AND BANKING.

1. *Collections by Bank—Relations of Bank and Customer.* The collection by a bank of a draft placed in its hands for that purpose establishes the relation of debtor and creditor, and not one of trust, between it and the party delivering the draft, although the delivery may have been made for the purpose of collection only, without any deposit, or agreement to deposit any part of the proceeds of the draft.—*Hal-lam v. Tillinghast* 20
2. *Liability of Stockholders.* When a corporation, which is authorized under the laws of this state to engage in banking and also in other distinct lines of corporate business, becomes insolvent, corporate assets, realized from the collection from stockholders of sums due under their statutory liability as shareholders in a banking corporation, should be applied in satisfaction of claims against the corporation arising out of its transaction of banking business, to the exclusion of other creditors.—*Kiggins v. Munday*..... 233

BILL OF PARTICULARS. See *PLEADING*, 5.

BILLS AND NOTES.

1. *Assignment after Maturity — Rights of Transferee.* Where a note is bought after maturity, the purchaser takes it subject to all the equities that existed between the original parties to its execution, and the fact that the maker has seen fit to place a demand arising out of the transaction in the shape of a judgment, will not estop him from pleading his equities against a purchaser of the note after maturity. — *Gordon v. Decker*..... 188
2. *Action on Promissory Note — Failure of Consideration.* A partial failure of consideration is a defense *pro tanto* to an action upon a promissory note, when such failure can be definitely ascertained by computation. — *Bay View Brewing Co. v. Tecklenberg*..... 469

SEE ASSIGNMENT; ATTORNEY AND CLIENT; EVIDENCE, 9;
EXECUTORS AND ADMINISTRATORS, 1, 2; MORTGAGE, 12.

BONDS. SEE ACTIONS, 1, 2; APPEAL, 12; CORPORATIONS, 7;
COUNTIES, 7, 8; LIMITATION OF ACTIONS, 1, 2; MUNI-
CIPAL CORPORATIONS, 26.

BURDEN OF PROOF. SEE EVIDENCE, 5; LIMITATION OF
ACTIONS, 1.

CANCELLATION OF INSTRUMENTS.

Cancellation of Deed — Mistake. Where a wife's separate property was included with that of her husband and that of the community in a deed given by him to secure certain creditors, the deed will be set aside as to her separate property when it was included without her knowledge, she being induced to sign the deed hurriedly without reading, on the representation that only the community property and the husband's separate property were covered by the instrument, and when her property formed no part of the consideration for the release by the creditors of their claims and no rights of innocent third parties have intervened. — *Loewenberg v. Glover*..... 544

CARRIERS.

Charges and Lien — When Tender Unnecessary. Where the carrier demands a sum in excess of the sum due for freight charges, the consignee need not tender any sum before bringing suit to recover the goods. — *Moran Bros. Co. v. Northern Pacific R. R. Co.*..... 268

SEE REPLEVIN, 1.

CERTIORARI.

1. *Review of Action of Board of Equalization.* The action of a board of equalization in fixing the valuation of property for taxation is subject to review by the courts, under Laws 1895, p. 115, § 4 (Bal. Code, § 5741), providing for the issuance of the writ of review in cases where an inferior tribunal or board exercising judicial functions has exceeded its jurisdiction or has acted erroneously, and there is no appeal nor any speedy and adequate remedy at law. — *Lewis v. Bishop.* 312
2. *Same.* The fact that the taxpayer has a remedy by injunction against the treasurer to prevent the sale of his property for taxes illegally assessed, in an action to foreclose the tax lien, to be instituted three years after delinquency, does not afford him such a speedy and adequate remedy as to deprive him of the right to a writ of review. — *Id.* 312

See Costs, 4.

CHATTEL MORTGAGES. See FRAUD, 2.

CIVIL SERVICE. See MUNICIPAL CORPORATIONS, 20.

COMMUNITY PROPERTY. See HUSBAND AND WIFE; TENANCY IN COMMON.

CONSTITUTIONAL LAW.

1. *Obligation of Contracts — Payment of Warrants Illegally Issued.* The statute (Laws 1897, p. 411, § 135; Bal. Code, § 2435), providing that illegal school warrants which had been validated by a vote of the school district should be paid, in case they had not been taken up by the issuance of funding bonds, only by a special tax levied for the purpose from year to year, and that the current revenues arising from the general school tax and fines should be applied exclusively to current expenses, is in no sense void as impairing the obligation of contracts. — *State, ex rel. Dunn v. Dorsey.* 120
2. *Obligation of Contracts — Action on Judgments.* The act entitled "an act relating to the duration of judgments," etc., (Laws 1897, p. 52; Bal. Code, §§ 5148-5150), providing that liens on judgments shall expire six years after their rendition, and that no action shall be had on any judgment rendered in the state by which its lien shall be extended for a greater period than six years from the date of entry of the original judgment, is unconstitutional as to existing judgments on the ground that it is an impairment of the obligation of contracts. — *Bettman v. Cowley.* 207

CONSTITUTIONAL LAW—CONTINUED.

3. *Due Process of Law—Forcible Entry and Detainer—Writ of Restitution.* Section 5584, Bal. Code, authorizing the plaintiff, upon the institution of an action of forcible entry and detainer or of unlawful detainer, to secure a writ of restitution awarding him the possession of the realty in controversy pending action, upon his giving bond securing the defendant for costs and damages in case the defendant should recover judgment, is not unconstitutional as being a deprivation of property without due process of law, since the statute goes no further than to provide for the temporary possession of the property pending action.—*State, ex rel. German Savings & Loan Society v. Superior Court*..... 336
4. *Due Process of Law—Imprisonment for Debt.* A statute authorizing a justice of the peace to adjudge costs against a complaining witness in a prosecution for misdemeanor and order his imprisonment until paid, in case the trial results in the acquittal of defendant and the court finds the complaint was frivolous and without probable cause, is not unconstitutional on the ground that it deprives a person of his liberty and property without due process of law.—*Colby v. Backus*..... 347

See ALIENS; CRIMINAL LAW, 12; EMINENT DOMAIN; HARBORS, 1; LOTTERIES.

CONTEMPT.

1. *Jurisdiction to Punish—Freedom of Press.* The constitutional guaranty that "every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right," does not grant immunity from the jurisdiction and process of courts in proceedings for contempt against those publishing articles reflecting on the court or judges thereof pending the trial of a case.—*State v. Tugwell*..... 238
2. *What Constitutes Publications Reflecting on Courts.* Under the inherent power vested in courts by the common law respecting the punishment of contempts and under the authority of Bal. Code, § 5798, providing that "disorderly, contemptuous, or insolent behavior toward the judge while holding court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings," shall be deemed a contempt of court, the publication in a newspaper, while a cause is pending on appeal before the supreme court, of an article reflecting on the integrity of the court, or of one of the judges thereof, and which tends to embarrass and disturb the conclusion of the court in the

CONTEMPT—CONTINUED.

- determination of the cause pending before it, is such conduct as to warrant the court's proceeding against the offender by attachment for contempt.—*Id.*..... 238
3. *Attachment—Waiver of.* The fact that attachment did not issue against the defendant in contempt proceedings is not a matter of which he can complain, when he has voluntarily appeared in the action.—*State, ex rel. Ditmar v. Ditmar.*.. 325
4. *Same—Necessity for Prior Demand.* Demand upon defendant to pay a decree of alimony against him is unnecessary, prior to proceedings for contempt, when it is shown that defendant asserted he would never obey the decree.—*Id.*..... 325

SEE DIVORCE, 1; JUDGMENT, 14.

CONTINUANCE. SEE CRIMINAL LAW, 1, 8.

CONTRACTS.

Rescission—Laches. Where one party to a contract intends to rescind it on account of a breach of it by the other, he must elect to do so speedily on the discovery of the breach; for delay is evidence of a waiver of the misconduct of the other party and is itself deemed an election to treat the contract as valid and binding.—*Thomas v. McCue.*..... 287

CORPORATIONS.

1. *Payment of Subscriptions in Property—Difference Between Value of Property and Amount of Subscription—Stockholder's Liability.* Where, on the organization of a corporation, real estate is turned in by one of the stockholders in payment of his shares at double the value of the real estate, and is so paid by him and accepted by the other stockholders without any intention of thereby defrauding existing or subsequent creditors, such stockholder is not liable for the difference between the face value of his shares and the actual value of the property given by him in payment therefor.—*Kroenert v. Johnston.*..... 96
2. *Contracts—Mortgages to Secure Stockholder's Debt.* Although corporations in this state have power under Gen. Stat., § 1500 (Bal. Code, § 4253), to mortgage real and personal property, such power must be confined within the purposes for which the corporation was created, and does not authorize corporations to mortgage their property to secure the debt of any, or all, of its stockholders, to the injury of its creditors.—*Washington Mill Co. v. Sprague Lumber Co.*..... 165

CORPORATIONS—CONTINUED.

3. *Same*. When a corporation enters into a contract which under no circumstances it has power to make, such contract is void as to its creditors, although assented to by all of its stockholders, since the party attempting to contract with the corporation is chargeable with notice of its powers.—*Id.* 165
4. *Same*. The securing by a corporation of a stockholder whose services will be valuable to it by reason of his being a practical machinist would not afford sufficient consideration for a mortgage of all the corporate property to secure the individual debt of such stockholder, even if it were conceded that the corporation had the power to execute a mortgage of such character.—*Id.* 165
5. *Same—Notes by Stockholders—When Creates Individual Liability*. The giving of a joint and several note by one stockholder of a corporation as principal and by the other stockholders as sureties creates an individual liability against the makers, although they may have intended by its execution to create an obligation against the corporation.—*Id.* 165
6. *Same—Rights of Creditors*. The fact that the stockholders of a corporation are estopped to deny the validity of certain notes and mortgages as subsisting corporate obligations is not necessarily binding upon the creditors nor the receiver of the corporation.—*Id.* 165
7. *Authority of Officers—Contract for Bond*. An order of the board of directors of a corporation authorizing its president and secretary to sign its name as sureties upon a bond for a given sum, would raise the presumption, that the authority given was merely to execute a bond providing for a penalty instead of one providing for liquidated damages.—*Roberts v. Washington Water Power Co.* 392
8. *Rights of Creditors—Mortgages*. A mortgage executed by a company while it was solvent is not fraudulent as to general creditors, where there was no fraud in the original incorporation of the company, and the stock was all issued as fully paid up, the mortgage duly recorded, and the debts of such general creditors incurred long afterwards.—*Manhattan Trust Co. v. Seattle Coal & Iron Co.* 493
9. *Same—Priorities Under Judgments Against Corporations*. General creditors of a corporation whose claims have been adjudged prior to the claims of holders of bonds secured by a trustdeed do not relinquish their priority as against the

CORPORATIONS—CONTINUED.

- bondholders by inviting certain other creditors to come in and participate on paying them a percentage, where there was no intention to relinquish their priority and their claims would have been paid in full, even if such other creditors have been allowed to participate.—*Id.*..... 498
10. *Insolvent Corporation — Preference to Creditor — Chattel Mortgage.* A chattel mortgage given by an insolvent corporation to a creditor for the purpose of preferring the mortgagee over other creditors is void.— *Van Brocklin v. Queen City Printing Co.*..... 552
11. *Dissolution — Priority of Claims.* Where the notes of an insolvent corporation are given to a stockholder in consideration of a purchase of his stock, not for the benefit of the corporation, but for that of a third person, such stockholder is not entitled to share in the assets of the corporation in the hands of a receiver, until after the claims of all other creditors, except those of stockholders for shares of capital stock, have been satisfied.— *Id.*..... 552
12. *Authority to do Business — Who may Question.* Although a corporation may not have been legally formed, the objection cannot be raised by the corporation or one dealing with it, to the injury or loss of other parties.— *Carroll v. Pacific National Bank*..... 639
13. *Preferences—Knowledge of Insolvency.* The fact that an insolvent corporation makes payment of a \$1,250 note due a bank by transferring to the bank \$1,200 worth of whisky would justify an inference that the bank had knowledge of the insolvent condition of the corporation.— *Id.*..... 639

See ALIENS, 1; BANKS AND BANKING, 2; FRAUD, 1;
FRAUDULENT CONVEYANCES, 1, 2; JUDGMENT, 11;
RECEIVERS, 2.

COSTS.

1. *Security for — Non-resident Plaintiff.* A judgment dismissing an action is warranted, when plaintiff has failed to comply with an order of the court requiring him to give security for costs on the ground of non-residence.— *Carlson Bros. & Co. v. Van de Vanter*..... 32
2. *Retaxation — Time for Motion.* Where, in a judgment for costs in favor of the prevailing party, the costs are taxed in blank, the failure of the losing party to move for retaxation within ten days after entry of judgment will not constitute a waiver of the right to retaxation.— *Bringgold v. Spokane*. 333

COSTS—CONTINUED.

3. *What Items Proper.* Stenographers' fees for attendance at court and transcribing testimony cannot be taxed against the losing party.— *Id* 333
4. *Certiorari—Judgment for Costs in Lower Court.* The office of a writ of review being to enforce the judgment which should have been rendered by the lower tribunal, where the lower tribunal has no jurisdiction to adjudge costs the superior court would be without jurisdiction to enter judgment for the costs incurred before such lower tribunal.— *Id* 333

See APPEAL, 10; CONSTITUTIONAL LAW, 4; CRIMINAL LAW, 12; EMINENT DOMAIN; NEW TRIAL, 2; WITNESSES.

COUNTIES.

1. *Board of Commissioners—Judicial Functions.* A board of county commissioners, when sitting as a board of equalization, exercises judicial functions in passing upon the valuations of property returned by the assessor; and from its decisions in such matters there is no appeal.—*Lewis v. Bishop*, 312
2. *Contract for Publication of Delinquent Tax List.* Under Laws 1893, p. 366, § 36, authorizing the county treasurer to enter into a contract for the publication of the delinquent tax list, a newspaper publisher who has published such delinquent tax list under contract with a county treasurer is entitled to have his claim therefor allowed by the county commissioners, provided the cost does not exceed the sum of thirty cents for each description.—*De Rackin v. Lincoln County*. . . 360
3. *County Commissioners—Allowance of Claims—Conclusiveness.* Bills of justices of the peace for salary should be presented to the county commissioners for allowance, and the action of the board in passing thereon is conclusive, in the absence of fraud or mistake.—*State, ex rel. Porter v. Headlee*, 477
4. *Same—Rescission.* An order of the county commissioners rescinding the former action of the board, when done at a special meeting and without any notice of the transaction of such business, is illegal and void.—*Id*. 477
5. *Authority of Attorney to Represent County in Injunction Suit—Evidence.* In such an action, in order to establish that the county attorney represented the county in the injunction suit, evidence is admissible showing that when the question of allowing plaintiff's claim was before the county commissioners one of the board said to the county attorney that

COUNTIES—CONTINUED.

- the matter was entirely in his hands and that as a member of the board he would do whatever the attorney advised in the matter, which was tacitly assented to by the other members.—*Id.*..... 477
6. *Same.* Evidence is likewise admissible, in such a case, showing that during the entire trial of the injunction suit two members of the board of county commissioners were present and that the county attorney conferred with them several times during the progress of the trial.—*Id.*..... 477
7. *Bond to County for Benefit of Material Men—Recitals.* Where a bond executed by a contractor for the construction of public improvements, under Gen. Stat., § 2415 (Bal. Code, § 5925) in order to protect laborers and material men, contains all the conditions required by the statute, the recital that it was taken as a common law, and not as a statutory, bond, would not vitiate it.—*Baum v. Whatcom County.*..... 627
8. *Same—Right of Action.* Where a county takes a bond from a contractor for the construction of a county road, under Gen. Stat., § 2415, for the benefit of laborers and material men, the right of action of a material man on account of supplies furnished is not against the county, but must be enforced against the bondsman and his sureties.—*Id.*..... 627

See HIGHWAYS, 1.

COURTS.

Commitment to Reform School—Jurisdiction of Municipal Court.

A municipal court being, under the constitution, an inferior court, and, under the statute, having concurrent jurisdiction with justice courts only, such municipal court has no jurisdiction to commit a child between the ages of eight and sixteen years to the reform school, but is merely authorized to send such child, when found guilty of any crime, mendicancy, vagrancy or incorrigibility to the superior court for further trial, under Laws, 1891, p. 195 (Bal. Code, §§ 2721-2727), providing that when such a child is found guilty, in any court of record in this state, of any crime except murder or manslaughter, or is growing up in mendicancy or vagrancy or is incorrigible, the court may in its judgment send such child to the state reform school; and, further, if such child shall be convicted before a justice of the peace or other inferior court of any crime, mendicancy, vagrancy or incorrigibility, it shall be the duty of

COURTS—CONTINUED.

said magistrate to send such child, with all papers filed in his office forthwith to a judge of a court of record for further proceedings. — *In re Barbee*..... 306

See APPEAL, 2; STATUTES, 1.

CRIMINAL LAW.

1. *Continuance*. The refusal of a continuance in a criminal cause does not show an abuse of discretion, when the cause has been finally set for trial more than five weeks after defendant's arrest, one continuance having been granted him in the meantime. — *State v. Burns*..... 52
2. *Comment by Court — Harmless Error*. A remark by the court concerning a criminal action, that "it is mostly a case of positive testimony," is not objectionable on the ground of being an expression of the court's opinion on the weight of the testimony. — *Id.*..... 52
3. *Same*. Error of the court in stating to the jury that it was not permissible to introduce evidence affecting the character of the defendant, that the court would not permit it, for instance, to be shown that he had committed another offense, is harmless, when the instructions were fair to the defendant otherwise and correctly stated the law, and it does not appear that prejudicial error resulted from the remark. — *Id.*..... 52
4. *Misconduct of Jury — Separation Before Verdict*. The fact that, after an order against the separation of jurors, one of them who was taken sick while the jury was out for a meal, was brought separately on a street car to the courthouse in charge of one bailiff, while the remainder of the jury walked there in charge of another bailiff, is not error when there is no showing that any of the jurors were tampered with in any manner. — *Id.*..... 52
5. *Joint Defendants — Right to Separate Trial*. Under Code Proc., § 1313 (Bal. Code, § 6949), which provides that "when two or more defendants are indicted or informed against jointly, any defendant requiring it shall be tried separately," a defendant is entitled as of right to a severance up to the assignment of the cause for trial, from which time until the jury is sworn to try the cause the matter of granting a severance is within the discretion of the court. — *State v. Mason*..... 94
6. *Misconduct of Jury — Separation After Verdict*. It is reversible error for a jury in a criminal case to agree upon and

CRIMINAL LAW—CONTINUED.

- deliver a sealed verdict to their foreman and then separate prior to coming into court to return their verdict, even though such action is pursuant to an agreement between the prosecution and defense and by direction of the court.—*Id.*..... 94
7. *Oath to Jury.*—An oath obligating the jury to try a criminal case before them “according to the law and the evidence as given on the trial,” is not prejudicial error, even if they are erroneously instructed as to the law upon a matter which is necessarily harmless to defendant. — *State v. Johnny Tommy* 270
8. *Record on Appeal — Continuance.* The action of the trial court in overruling an application for continuance will not be considered on appeal, in the absence of a statement of facts. — *Id.*..... 270
9. *Same — Instructions.* Alleged errors in instructions as to evidence will not be considered on appeal, in the absence of a statement of facts. — *Id.*..... 270
10. *Instructions — Harmless Error.* In a prosecution of two defendants jointly, the failure of the court to instruct that a confession of one cannot be considered against his co-defendant, is not error, when the state expressly disavowed in open court any application of the confession as against the one not joining in it and when there were instructions as to what must be found against each defendant to warrant a verdict against him. — *Id.*..... 270
11. *Separation of Jury.* The jury in a criminal case may, at any time before the submission of the cause to them, be allowed to separate, under the authority of Code Proc., § 359 (Bal. Code, § 4999). — *Id.*..... 270
12. *Costs Against Complaining Witness.* — A statute authorizing the imprisonment of the complaining witness in a malicious prosecution until payment of the costs of the action imposed upon him by the justice as a penalty, is not in violation of the constitutional inhibition against imprisonment for debt, as such constitutional provision relates only to liabilities arising on contract. — *Colby v. Backus*..... 347
13. *Assault and Battery — Sufficiency of Information.* Although an information may charge defendant with the crime of assault with a deadly weapon, which is a statutory offense, the defendant may be convicted, under the information, of the common law offense of assault and battery, when the facts set forth in the pleading are sufficient to describe the latter offense. — *State v. Klein*..... 368

CRIMINAL LAW—CONTINUED.

14. *Instructions.* No error can be predicated upon the court's refusal to give a requested instruction, when the instruction given by the court covers all the points asked by defendant.
— *Id.* 368
15. *Rebuttal Evidence.* The admission of rebuttal evidence is a matter largely in the discretion of the trial court, and its action in that regard will not be disturbed when it does not appear to be prejudicial to defendant. — *Id.*..... 368
16. *Instructions—Description of Offense—Equivalent Words.* An instruction charging the jury to bring in a verdict for defendants unless they find that defendants forcibly took from the person of the prosecuting witness lawful money of the United States belonging to him, with the intent to convert the same to their own use against the will of said prosecuting witness, is sufficient, as the words used are equivalent to describing the act as feloniously done. — *State v. Johnson.* 410
17. *Same—Failure to Instruct—Harmless Error.* No error can be predicated upon the court's omission to define the phrase "reasonable doubt," when there is no request therefor. — *Id.* 410
18. *Limitation on Prosecution—Murder.* Under Code Proc., § 1188 (Bal. Code, § 8780) which provides that prosecutions for the offenses of murder and arson, where death ensues, may be commenced at any period after the commission of the offense; and for offenses the punishment of which may be imprisonment in the penitentiary, within three years after their commission, the term murder includes both degrees of that offense, and manslaughter, and for such crimes a prosecution may be instituted at any period after the commission of the offense, although the lower degrees of homicide may be punished only by imprisonment in the penitentiary. — *State v. Erving*..... 435
19. *Same—What Constitutes Commencement of Prosecution.* A preliminary examination before a committing magistrate constitutes the commencement of a prosecution within the meaning of Code Proc., § 1188, fixing a limitation on the commencement of prosecutions. — *Id.*..... 435
20. *Prosecution of Accessories.* The object of the statute (Code Proc., § 1189; Bal. Code, § 8782) abolishing the distinction between principals and accessories before the fact, so far as their trial and punishment are concerned, was to do away with the technical hindrances which before existed in relation to the trials of accessories, to provide for the indict-

CRIMINAL LAW—CONTINUED.

ment and trial of an accessory though the principal had been acquitted and to make an accessory before the fact the same as a principal, so far as the mode, manner, time of trial and extent of punishment are concerned.—*State v. Gifford*..... 484

See HOMICIDE; INDICTMENT AND INFORMATION; JURY, 1, 2; LARCENY; MUNICIPAL CORPORATIONS, 2-4; RAPE; ROBBERY.

DAMAGES.

Double Damages—When Allowable. Under Code Proc., § 564, double damages may be awarded against the defendant in an action of forcible entry and detainer, where there is substantially a claim for such damages stated in the complaint. *Hart v. Pratt*..... 560

See APPEAL, 12; ASSIGNMENT; ATTACHMENT, 4.

DEATH BY WRONGFUL ACT.

Action for Injuries Causing Death—Parties—Construction of Term "Heirs"—Under Code Proc., § 13 Bal. Code, § 4828), giving a right of action to heirs of any person whose death is caused by the wrongful act or neglect of another, the term "heirs" must be restricted to the widow and children of deceased, and does not include parents or collateral relatives, in view of the facts that another provision of the same section confines the right of recovery to "the widow or widow and her children, or child or children, if no widow;" that Code Proc., § 139 (Bal. Code, § 4829), gives a right of action to parents or guardian for death of a minor child or ward; and that Code Proc., § 148 (Bal. Code, § 4838), provides that no action for personal injury occasioning death shall abate, but the right of action shall survive in favor of the wife and children.—*Noble v. Seattle* 183

DEDICATION.

Rights Reserved by Dedicator. In platting an addition to a city and dedicating streets therein to the public, the dedicator cannot reserve the right to operate street railway lines upon the streets, as any condition annexed to a dedication falls, but a grant stands.—*State, ex rel. Grinsfelder, v. Spokane St. Ry. Co.*..... 518

DIKES.

1. *Reassessment for Cost of Construction—Legislative Power.* The legislature has power to provide for a reassessment of property for local improvements in cases where the original assessment was void because of lack of legislation authorizing it, but a reassessment made without legislative sanction is utterly ineffectual and void.—*Franklin Savings Bank v. Moran*. 200
2. *Same.* The act of March 19, 1895, (Laws 1895, p. 142, Bal. Code, §§ 3755-3762), entitled "an act to provide for the payment of expenses incurred in compliance with an act entitled 'an act to provide for the construction, repairing and protection of drains and ditches for agricultural, sanitary and domestic purposes and to provide for the organization of drainage districts and declaring an emergency,' approved March 19, 1890," while authorizing reassessments to pay for construction of drains and ditches, make no provision in regard to dikes and cannot be held as authorizing a reassessment to cover the expense of dikes and dams constructed under a void statute.—*Id* 200

See PLEADING, 4; TAXATION, 4.

DIVORCE.

1. *Alimony—Failure to Comply with Award—Contempt.* The court has power to punish for contempt for failure to comply with an order for the payment of alimony, although the decree awarding alimony may have been made a lien upon the defendant's realty.—*State, ex rel. Ditmar v. Ditmar* 325
2. *Same—When Defendant Liable.* A finding by the trial court that defendant is able to satisfy a decree of alimony against him is warranted when it is shown that he has been able to borrow more than double the amount of the decree to apply in other ways.—*Id* 325

See APPEAL, 24; CONTEMPT, 4; VENUE.

DRAINAGE. See DIKES, 2; TAXATION, 4.

EJECTMENT.

- Sufficiency of Plaintiff's Title—Equitable Mortgage.* A deed absolute in form, but intended as a mortgage to secure a debt, passes no title to the grantee, and hence does not afford such title as to uphold an action of ejectment.—*Snyder v. Parker* 276

ELECTRICAL USES AND APPLIANCES. See MASTER AND SERVANT, 3.

EMINENT DOMAIN.

Costs in Condemnation Proceedings—Constitutional Law.—Section 17, Laws 1895, p. 88 (Bal. Code, § 3787), providing that when condemnation proceedings are instituted against any person to whom tender has been made, and such person shall fail to recover judgment for a greater sum than the amount tendered, all costs of such condemnation proceedings shall be taxed against him, is void, since it is in conflict with art. 1, § 16, of the constitution, which provides that private property shall not be taken or damaged for public or private use without just compensation having been first made, or paid into the court for the owner; for the reason that under such constitutional guaranty costs cannot be taxed against a non-consenting owner in condemnation proceedings.—*Adams County v. Dobschlag*..... 356

EQUITY.

Jurisdiction—Collection of Taxes. Courts of equity have no jurisdiction to collect taxes or to appoint a receiver for that purpose.—*Pierce County v. Merrill*..... 175

See ATTACHMENT, 1; CANCELLATION OF INSTRUMENTS.

ESTOPPEL. See APPEAL, 11; BILLS AND NOTES, 1; MORTGAGE, 1; SALES, 7.

EVIDENCE.

1. *Transaction with Decedent.* A party to a transaction is not barred from testifying in regard thereto by the death of one of the adverse parties, when there is no attempt to prove any conversation or transaction with the deceased and the testimony is confined to transactions with one of the adverse parties still living.—*Rauh v. Scholl*... 30
2. *Admissions.* In an action to recover for the value of labor performed for defendant, it is competent for plaintiff to introduce in evidence a memorandum of time kept under the direction of defendant's foreman, as an admission on the part of the defendant supporting plaintiff's claim.—*Selber v. Springbrook Trout Farm*..... 49
3. *Record Showing Appointment of Foreign Administrator.* In an action in the courts of this state by an assignee of a promissory note and mortgage, which had been assigned to him

EVIDENCE—CONTINUED.

- by a foreign administrator, the record of the foreign court showing the appointment of plaintiff's assignor as administrator is admissible in evidence.—*Waldo v. Milroy*..... 156
4. *Admission of Agent.* The admissions of one who was acting as agent for defendant throughout certain transactions as to the indebtedness of defendant to plaintiff's assignor growing out of such transactions, are admissible in evidence.—*Wright v. Stewart* 179
5. *Burden of Proof.* The burden of proof rests upon that party, either plaintiff or defendant, who holds the affirmative of any proposition necessary to be established.—*Id.*..... 179
6. *Parol—Admissible to Show Consideration.* Parol testimony is admissible for the purpose of proving the real consideration of a contract which recites that it is given for one dollar and "other considerations," if such testimony is not for the purpose of contradicting the written instrument or of defeating the operative effect of it, but merely in explanation of how the contract came to be made, and the consideration for it.—*Id.*..... 179
7. *Burden of Proof—Illegality of Consideration.* In an action upon a written contract based upon a valid consideration, to which there was interposed an affirmative defense that the contract was based upon an illegal consideration, the burden of proof is on defendants, and judgment in their favor is unwarranted when there is no other proof of the illegality of the consideration than such as is contained in plaintiff's original answers to interrogatories, and these answers at the time of trial had been explained and amended by the substitution of new answers showing the consideration to be the same as recited in the contract.—*Hosher v. Kautz* 258
8. *Secondary Evidence—Foundation for.* When a letter is admissible in evidence, secondary evidence of its contents is admissible, when the witness testifies that he has no idea where the letter is and cannot produce it in court.—*State v. Erving* 435
9. *Promissory Notes—Variation by Parol—Wife's Personal Liability.* In an action against a wife upon a joint and several note executed by herself and husband, an answer alleging a parol agreement that she was not to be held personally liable thereon, but had only signed it as a member of the community, does not constitute a defense.—*Hemrich v. Wist*..... 516

EVIDENCE—CONTINUED.

10. *Declarations of Party—When Admissible.* Declarations of a party to the record, not given for the purpose of impeachment, are admissible against him as independent evidence in chief. — *Hart v. Pratt*..... 560
11. *Action for Personal Injuries—Reputation for Sobriety.* In an action to recover for personal injuries alleged to have been caused by defendant's negligence, where evidence of plaintiff's intoxication at the time of the injury has been admitted, the plaintiff cannot, in order to rebut such evidence, prove his general reputation for sobriety. — *Carter v. Seattle* 597
12. *Same—Pleading and Proof—Contributory Negligence.* In a negligence case, in which defendant pleads a general denial, and also plaintiff's contributory negligence, and there is no motion to make the answer more specific, evidence of plaintiff's intoxication, as the cause of the injury received by him, is admissible. — *Id.*..... 597
13. *Hearsay.* Declarations of one assuming to be an agent as to what his principal said or concluded to do respecting a matter in controversy are inadmissible on the ground of being hearsay evidence. — *Gregory v. Loose*..... 599
14. *Proof of Agency—Declarations of Agent.* The acts and declarations of an agent are not competent evidence in proof of agency. — *Id.* 599
15. *Parol Proof—False Representations.* Parol proof of fraudulent representations is admissible for the purpose of avoiding a written contract induced by them, and it is immaterial whether the fraud relates to the consideration or to the execution of the contract. — *Griffith v. Strand*..... 686

See EXECUTORS AND ADMINISTRATORS, 2; HOMICIDE, 1;
LARCENY, 3.

EXECUTORS AND ADMINISTRATORS.

1. *Claims Against Decedent's Estate—Action on Rejected Claim.* In presenting to the administrator of an estate a claim based upon a promissory note, a copy of the note verified by affidavit is sufficient under Code Proc., § 980 (Bal. Code, § 6229), without producing the original, unless the production of the latter for examination may have been demanded by the administrator. — *First National Bank v. Root*..... 111
2. *Same—Evidence.* In an action against an administrator upon a claim founded upon a promissory note, which had been

EXECUTORS AND ADMINISTRATORS—CONTINUED.

rejected by him, both the original note and the rejected statement of claim containing a copy of the original note, are admissible in evidence. — *Id.*..... 111 .

3. *Ancillary Administration—Necessity for.* An assignee of an administrator appointed in one state may bring an action in another without administration being first had in the latter state. — *Munson v. Exchange National Bank*..... 125
4. *Same.* The assignee of a foreign administrator may maintain an action in the courts of this state, although no administration has been had in this state upon that portion of decedent's estate situated here. — *Waldo v. Milroy*..... 158
5. *Administration Out of Court—Presentation of Claims.* Where a testator has disposed of his estate by vesting his executors with full authority to administer same without the intervention of the probate court, notice to creditors is not necessary; and hence failure to present a claim within one year after publication of notice to creditors, will not operate to bar action thereon. — *Moore v. Kirkman* 605

See ASSIGNMENT; EVIDENCE, 3.

FORCIBLE ENTRY AND DETAINER. See CONSTITUTIONAL LAW, 3; DAMAGES.

FRAUD.

1. *Excessive Capitalization of Corporation.* The capitalization of a coal mining company at \$5,000,000 is not shown to be fraudulent by the fact that the property of such corporation consisted of coal lands purchased by the promoters of the corporation for a sum less than \$100,000, where the grantors did not know the full value of the land and some sold for less than they believed it worth for the purpose of developing that section of the country, and estimates obtained by the promoters showed that there were more than 10,000,000 tons of coal in the land, which could be put on the market at a profit of from one to two dollars per ton.—*Manhattan Trust Co. v. Seattle Coal & Iron Co.*..... 493
2. *Enforcement of Mortgage Invalid in Part.* The fact that the holder of a mortgage covering both real and personal property undertakes to enforce the claim under the mortgage, though the mortgage on the personalty is invalid, is not sufficient to establish fraud on the part of the mortgagee.—*Id.*..... 493

See CORPORATIONS, 8; EVIDENCE, 15; SALES, 5-7; TRIAL, 9.

FRAUDULENT CONVEYANCES.

1. *Mortgage by Corporation—Disaffirmance by Receiver—Rights of Creditors.* A receiver of an insolvent corporation may, in behalf of creditors disaffirm acts of the corporation and maintain action to set aside transfers and conveyances of the corporate property made in fraud of their rights.—*Washington Mill Co. v. Sprague Lumber Co.*..... 165
 2. *Same*—Where mortgages given by a corporation have been declared invalid at the suit of a receiver of the corporation, all *bona fide* creditors, prior as well as subsequent, are entitled to participate in whatever funds the receiver may procure as the proceeds of the property of the corporation.—*Id.*... 165
- See CORPORATIONS, 10.

GARNISHMENT.

Defenses—Motion to Quash Garnishment. Where an action is brought in this state against an insolvent foreign corporation, for which a receiver has been appointed in a foreign jurisdiction, to whom all its assets have been assigned, and a writ of garnishment has been issued against a resident debtor of the corporation to recover upon a note and mortgage, such corporation cannot by special appearance move to quash the writ of garnishment, as whatever interest it has in the mortgage debt may be asserted in conjunction with the defense to the garnishment set up by the payors of the note.—*Prussian National Ins. Co. v. Northwest F. & M. Ins. Co.*..... 231

HARBORS.

1. *Tide Lands—Lease for Purposes of Navigation and Commerce—Construction of Constitutional Provisions.* Under art. 15, § 1, of the constitution, forbidding the sale of harbor areas and providing that they “shall be forever reserved for landings, wharves, streets and other conveniences of navigation and commerce,” the term “commerce” must be construed as modified by the employment of the term “navigation,” and the commercial use of such areas must be restricted to such as are aids to navigation; consequently the erection of structures on such areas for the “curing and canning of fish, maintaining a retail and wholesale fish market and the storage of ice for packing and handling fish,” are not “conveniences of navigation and commerce,” and hence not permissible under the constitution.—*State, ex rel. Denny v. Bridges*..... 44

HARBORS—CONTINUED.

2. *Same*. Under art. 15, § 2, of the constitution, authorizing the legislature to "provide general laws for the leasing of the right to build and maintain wharves, docks and other structures upon the areas mentioned in section one" of said article, the term "other structures" is governed by the rule of *ejusdem generis*, and falls within the *genus* "conveniences of navigation and commerce," and the statute (Laws 1897, p. 255, § 53: Bal. Code, § 2183), passed in pursuance thereof does not contemplate leases for any other purpose.
— *Id* 44

HIGHWAYS.

1. *Alteration and Establishment—Order of County Commissioners—Appeal*. A final order of the board of county commissioners vacating a road and establishing another, in lieu thereof, is appealable. — *Hull v. Stevenson*..... 572
2. *Same—Parties*. Under Laws 1895, p. 82, § 2, giving a land-owner residing in the vicinity the right to petition for the establishment of a county road, although he does not own lands abutting thereon, the qualification to petition for the road carries with it the right to resist, if so desired, and consequently the right of appeal from an adverse decision.
— *Id* 572

See DEDICATION; MUNICIPAL CORPORATIONS, 1; TIDE LANDS, 7.

HOMICIDE.

1. *Evidence—Possession of Weapon*. In a prosecution for murder to which the defense of justifiable homicide has been interposed on the ground that deceased made an assault with a pistol, which was afterwards found on the ground near where the killing occurred and introduced in evidence, the testimony of persons likely to know whether deceased ever owned the pistol is admissible for the purpose of establishing that deceased had never been seen with the pistol introduced in evidence. — *State v. Lattin* 57
2. *Murder—Sufficiency of Information*. An information charging murder sufficiently describes the crime, when it alleges that defendant "did purposely and of deliberate and premeditated malice, killed one Kelly Annan, as follows" (describing the manner of killing), although the information does not allege that the particular acts or instrumentalities of the killing were done unlawfully, with deliberate and premeditated malice. — *State v. Johnny Tommy*..... 270

HOMICIDE—CONTINUED.

3. *Murder in Second Degree—Sufficiency of Evidence.* A verdict finding defendant guilty of murder in the second degree is warranted, when it appears from the evidence that deceased was found at the bottom of an abandoned well on an unoccupied farm on Whidby Island some three years after his disappearance, with marks on his skull indicating he had been struck there by a blunt instrument; that deceased was last seen alive in company with defendant, going in the direction of the premises where the body was afterward discovered; that defendant and deceased had become acquainted in the city of Seattle at a time when deceased had money on his person; that defendant induced deceased to go to Whidby Island, promising him employment; that defendant represented, upon being asked what had become of his friend (deceased), that the latter had returned to Seattle the day before; that there was but one boat a day from the island, and that deceased did not take the boat on the day indicated by defendant; that the island was sparsely settled, the people well known to one another, and the movement of strangers always a matter of note; that defendant left the island and lived under an assumed name; that when arrested he denied his real name and claimed he never knew such a man as the deceased. — *State v. Erving*..... 435

HORSE AND STREET RAILROADS. See STREET RAILWAYS.

HUSBAND AND WIFE.

- Relative Rights of Community and Individual Creditors.* Community personalty is subject to execution upon a judgment for the separate debt of one of the spouses, even as against community creditors, when the latter have not obtained a prior specific lien on the property. — *Morse v. Estabrook*.... 92

See CANCELLATION OF INSTRUMENTS; EVIDENCE, 9.

INDICTMENT AND INFORMATION.

1. *Assault with Intent to Commit Crime—Sufficiency of Information.* Under the rule that it is not essential to use the words of the statute if others of like import are used, an information charging defendant with making an unlawful and felonious assault is equivalent to charging it as made "in a rude, insolent and angry manner." — *State v. Bohn*... 36

INDICTMENT AND INFORMATION—CONTINUED.

2. *Same.* When an information alleges a consummated assault in the attempt to commit a crime, a further allegation that defendant had the present ability to carry the attempt into execution is surplusage and not necessary to be alleged.—*State v. Bohn*..... 36
3. *Accessory Before the Fact — Sufficiency of Information — Rights of Accused.* One guilty as an accessory to the crime of rape by procuring its commission by another cannot be convicted under an information charging him as a principal with the commission of the crime by having carnal knowledge of the prosecutrix, as such an information would be in violation of his constitutional right (art. 1, § 22) to be informed of the nature and cause of the accusation against him.—*State v. Gifford*..... 464
- See CRIMINAL LAW, 18; HOMICIDE, 2; LARCENY, 1, 2; RAPE; ROBBERY.

INJUNCTION.

When Lies — Restraining Performace of Official Duties. Injunction will not lie to restrain the officers of the state from complying with the provisions of an act of the legislature requiring them to perform certain public duties, in the absence of a showing that the complainant will be pecuniarily and directly injured by the acts complained of.—*Birmingham v. Cheetham*..... 657

INSANE PERSONS.

Action Against Insane Person — Guardian ad Litem. Where plaintiff knows, either at the time of service of summons or at the time of rendition of judgment that defendant is *non compos mentis* it is incumbent on him to suggest it to the court, in order that a guardian *ad litem* may be appointed.—*Townsend v. Price*..... 415

INSOLVENCY. See CORPORATIONS, 10, 11, 13; FRAUDULENT CONVEYANCES, 1.

INTEREST.

On State Warrants — Rate. Under § 3 of the act of March 20, 1895, (Laws 1895, p. 349, Bal. Code, § 3670), providing that all state warrants shall draw interest at a rate not greater than eight per centum per annum, unless a less rate be specified therein, the state treasurer must pay eight per

INTEREST—CONTINUED.

centum on state warrants issued subsequent to the passage of the act, and which contain no provision as to the rate of interest, although another section of the same act provides that the legal rate shall be seven per cent. as to private contracts, where no different rate is agreed to in writing.—*Spokane and Eastern Trust Co. v. Young*..... 122

See MUNICIPAL CORPORATIONS, 7-9.

INTERPLEADER.

When Lies. A complaint of interpleader does not state a cause of action, though alleging that plaintiffs hold a sum of money claimed by different parties, whose rights they desire adjudicated, when it further appears from the complaint that the money is the proceeds from the sale of a boom of logs, which had been levied upon by a judgment creditor of one of the parties in a logging firm, that the plaintiffs had set up a claim of ownership under a contract with the firm and given a bond for possession of the logs, and that, upon a trial of their claim, the judgment creditor had been given judgment against plaintiffs on their forthcoming bond for the value of the logs.—*Carstens v. Gustin*..... 408

INTERVENTION. See APPEAL, 14; JUDGMENT, 18.

IRRIGATION. See MANDAMUS, 2, 3.

JUDGES.

1. *Powers of Outgoing Judge — Certification of Statement of Facts.* The settlement and certifying of a statement of facts by the court is a judicial act, which can be exercised only by one vested with judicial power; hence the act of March 8, 1893 (Bal. Code, § 5061), which authorizes and requires a judge whose term of office has expired to settle statements of facts in actions previously tried before him, is invalid and unconstitutional, as attempting to impose judicial functions on one whose judicial powers, as prescribed under the constitution, have terminated with the expiration of his term of office.—*Hallam v. Tillinghast*..... 20
2. *Powers of Incoming Judge — Rendition of Judgment.* Where the term of a trial judge has expired judgment may properly be rendered by the succeeding judge.—*Rauh v. Scholl*..... 30

See APPEAL, 4.

JUDGMENT.

1. *Time of Rendition.* Where, after verdict, a motion for a new trial has been interposed, the rendition of judgment at the time of deciding such motion is timely.— *Rauh v. Scholl* 30
2. *Res Judicata — Parties Bound — Assignees.* Where the issue has been raised and determined in an action by a bank upon a note and over draft that defendant, who had served the bank as attorney, was entitled to nothing on a counterclaim for services rendered, an assignee of the bank who has taken all its assets in consideration of discharging all its liabilities is entitled to plead such judgment as *res judicata* in an action against it on account of such services brought by an assignee of the attorney, who acquired his claim pending the former action. — *Davis v. Seattle National Bank* 65
3. *Same — To be Determined by the Issues.* In determining whether the subject matter of litigation is *res judicata* as to parties and their privies, the court is governed only by the issues and judgment in the prior action, and cannot consider grounds for the judgment which are not contained in the record. — *Id.* 65
4. *Setting Aside Judgment — Procedure.* A court has no authority to vacate its judgment on motion made therefor years after its rendition, but the defendant must proceed by an action in equity to set aside the judgment. — *State, ex rel. Boyle v. Superior Court.* 128
5. *Time of Entry.* The entry of a judgment some six months after its rendition does not render it void under the constitutional provision requiring a decision by the superior court within ninety days after the final submission of any cause to it, when the decision of the court was in fact given orally at the close of the trial. — *West Philadelphia Title & Trust Co. v. Olympia* 150
6. *Vacation of — Time of Application for.* Where all questions concerning the validity of certain city warrants have been tried and determined in an action against the original payee of the warrants, an action by his assignee to vacate the judgment, more than four years after the entry of judgment in the original action, is not seasonably made. — *Id.* 150
7. *Res Judicata.* A judgment against plaintiff in an action seeking to enjoin defendants from wharfing a strip of tide land abutting on land purchased by them of plaintiff, which disputed strip had been occupied by them over twenty years, is conclusive on the parties and those claiming

JUDGMENT—CONTINUED.

- through them, as to the title to the disputed strip. — *Denny v. Northern Pacific Ry. Co.*..... 298
8. *Foreclosure of Mortgage — Judgment Lien.* Under Code Proc., § 449, providing that a judgment lien shall attach from the date of judgment, if a transcript thereof be filed in the county auditor's office within twenty days, a decree of foreclosure becomes a lien upon the mortgagor's general realty for any deficiency after sale of the mortgaged premises from the day of its rendition, in case a transcript of the decree is filed within twenty days thereafter. — *W. P. Fuller & Co. v. Hull* 400
9. *Transcripts — Necessary Parties.* Under Code Proc., § 449, providing that the transcripts of judgments shall contain "the names at length of all the parties," it is necessary to include only the names of parties against whom a money judgment is rendered. — *Id.*..... 400
10. *Res Judicata — Subjects Concluded by Prior Action.* In a mandamus proceeding to compel a county auditor to draw a warrant for the salary of a justice of the peace, the defendant cannot raise the defense that the city in which the justice had jurisdiction had a population less than 5,000 and that the justice had waived his right to salary through failure to pay into the county treasury the fees collected by him, when such questions have already been decided adversely to the county in an injunctive suit brought by the county attorney in his own name, but in the interest of the county, which authorized the proceedings and paid the costs of the action, for the purpose of determining the liability of the county on account of the claim at bar and others of similar nature. — *State, ex rel. Porter v. Headlee* ... 477
11. *Same — Parties Concluded.* A judgment giving priority to the claims of certain general creditors of a corporation over the holders of bonds secured by a trust deed executed by such corporation, rendered in an action to foreclose such deed brought by the trustee therein, is conclusive on all the bondholders, where the trust deed provided that such trustees should be trustee for all the bondholders and have the exclusive right to bring suit on the request of a majority, and that no bondholder should be entitled to sue without having first requested the trustee to sue. — *Manhattan Trust Co. v. Seattle Coal & Iron Co.*..... 493
12. *Ex Parte Modification.* The vacating of a judgment on the pleadings, on defendant's motion for a new trial, and enter-

JUDGMENT—CONTINUED.

ing judgment for a less sum, in the absence of plaintiffs, is prejudicial error, when the pleadings are so vague and confusing that it is difficult to determine exactly what the issue is. — *Griffith v. Maxwell*..... 614

13. *Judgment on Demurrer—Conclusiveness.* Where a third party intervenes in a pending action for the purpose of claiming property, and judgment is rendered against intervenor upon demurrer to the complaint in intervention, such judgment is conclusive against the assertion of the same rights in a subsequent action. — *Plant v. Carpenter* 621

14. *Void Judgment—Persons Concluded.* A party or officer is not bound by a void injunction or order of the court, and will not be punished for its violation. — *Savage v. Sternberg* 679

See APPEAL, 32, 34; CONSTITUTIONAL LAW, 2; COSTS, 1, 2; JUDGES, 2; MORTGAGE, 4; PLEADING, 7; PROHIBITION, WRIT OF, 3.

JURY.

1. *Qualifications of Jurors—Householders.* Jurors must be householders, whether summoned on a regular panel or on an open venire to complete the panel, under Laws 1895, p. 139, providing that jurors summoned to serve on grand and petit juries shall be householders, and under Code Proc., § 339 (Bal. Code, § 4978), which requires a juror summoned on an open venire to have the same qualifications as if he had been previously selected on the original list.—*State v. Lattin*..... 57

2. *Competency—Bias.* Where a juror discloses on his examination that he has an opinion as to the guilt or innocence of the defendant, which it would take evidence to remove, and it does not clearly appear that he could nevertheless accord the defendant a fair and impartial trial, he is subject to challenge for cause—*Id.*..... 57

See CRIMINAL LAW, 4, 6, 7, 11; TRIAL, 5.

JUSTICE OF THE PEACE. See COUNTIES, 3; JUDGMENT, 10.

LANDLORD AND TENANT.

1. *Surrender of Lease—Evidence.* Although a lease for a term of years may be required by the statute of frauds to be put in writing, a writing signed by the lessee and delivered to

LANDLORD AND TENANT—CONTINUED.

- the reversioner is not necessary in order to effect a surrender of the leasehold interest, if there are acts which are equivalent to an agreement on the part of the tenant to abandon, and on the part of the landlord to resume, possession of the demised premises.—*Hart v. Pratt*..... 560
2. *Same*. A jury is warranted in finding that a tenant surrendered his interest under a leasee, when the evidence shows he knew of the sale of the premises, and, after demand that he remove, gave up control of the property, offered to do work about the place in consideration of the use of the dwelling house occupied by him, and declined to leave in the end, on account of a difficulty he had with the purchaser's agent.—*Id*..... 560
3. *Same—Surrender to Agent*. A tenant may make surrender of his interest under a lease to the reversioner's agent, as well as the reversioner himself.—*Id*..... 560

See TIDE LANDS, 1.

LARCENY.

1. *Sufficiency of Information—Description of Money*. In an information charging the larceny of money a description of the property stolen as being two one hundred dollar bills and one fifty dollar bill, lawful money of the United States, is sufficient under Code Proc., § 1253 (Bal. Code, § 6859), which provides that in such cases it is sufficient to allege the larceny to be of money or bank notes, without specifying the coin, number or denomination or kind thereof.—*State v. Burns*..... 52
2. *Evidence—Variance*. The fact that an information charging the larceny of money, after naming the number and denomination of the bills, alleges further "a more exact description being not now known," while a witness for the state gives an exact description of the bills in his testimony, does not constitute a fatal variance, when there is no showing of want of diligence on the part of the prosecuting attorney to ascertain and charge the exact description.—*Id*..... 52
3. *Same—Relevancy*. In a prosecution for larceny of money, it is competent to put in evidence the money taken from the defendant's person when arrested, although not identified as a part of the stolen money, merely as a circumstance showing he had money when arrested, which the jury might properly consider.—*Id*..... 52

LEVY AND SEIZURE. See HUSBAND AND WIFE; MORTGAGE, 5.

LIMITATION OF ACTIONS.

1. *Partial Payment — Burden of Proof.* Where the bar of the statute of limitations has been pleaded against an action on account, the burden of relieving the account of the bar by proof of partial payment within the period of limitation, is upon the plaintiff, and, in case of denial of part payment by defendant, can be established only by clear and convincing testimony.—*Gibson v. Kerry*..... 159
2. *Official Bonds — Action on.* Where the duties of a public officer are prescribed by statute, and to secure their proper performance an official bond is given by him, such bond creates no obligation in itself, but merely operates as collateral security for the proper discharge of his official duties; and an action on the bond on account of a breach of official duty would not be an action on a written contract, and would, consequently, be barred under the statutory limitation of three years upon the commencement of actions "upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument."—*Spokane County v. Prescott*..... 418
3. *Same — Leave of Court to Sue — Running of Statute.* The disability to begin action upon an official bond, imposed by § 5686, Bal. Code, until leave of court shall be obtained therefor, would not enlarge the statute of limitations, when the plaintiff had the option at any time to obtain leave of court to bring its action, and the failure to obtain leave was due to its own delinquency.—*Id*..... 418

See CRIMINAL LAW, 18, 19; PLEADING, 8, 9.

LIS PENDENS.

1. *Notice Executed by Attorney.* A *lis pendens* notice may properly be signed by the attorney of the party desiring to file it as well as by the party himself.—*Eldridge v. Stenger* .. 697
2. *When Uneffective as Constructive Notice.* Under Laws 1893, p. 413, providing that every person whose conveyance or incumbrance is executed or recorded subsequently to the filing of *lis pendens* notice shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were a party to the action, one who has taken a mortgage with knowledge of an outstanding unrecorded deed on the premises cannot bind the holder of the

LIS PENDENS—CONTINUED.

unrecorded deed by filing notice of *lis pendens* upon the institution of a suit to foreclose his mortgage.—*Id.*..... 697

See PROHIBITION, WRIT OF, 2.

LOGS AND LOGGING. See PRINCIPAL AND AGENT.

LOTTERIES.

1. *Constitutional Law—Prohibition of Lotteries.*—The constitutional provision (art. 2, § 24) that “the legislature shall never authorize any lottery” is mandatory and self-executing and prohibitory of lotteries for any purpose, charitable or otherwise.—*Seattle v. Chin Let.*..... 38
2. *Same.* The provision in Penal Code, § 139 (Bal. Code, § 7259), permitting lotteries for charitable purposes, although enacted prior to the framing of the constitution, falls within the constitutional prohibition against lotteries, and is therefore invalid.—*Id.*..... 38

MANDAMUS.

1. *Office—Trial of Title.* Mandamus is not the proper remedy, when the title to an office is in controversy.—*Lynde v. Dibble.*..... 328
2. *Enforcement of Assessments Against Irrigation Districts—Parties.* Where it is made the duty of the county commissioners to make an assessment to pay the interest upon the bonds of an irrigation district, upon the failure of the district directors to make provision therefor, mandamus will lie to compel the county commissioners to levy such assessment, if the right to relief is clear, and in such an action the irrigation district is not a necessary party, when the legality of the bonds has already been determined in another action to which it was a party.—*State, ex rel. Witherop v. Brown.*.... 383
3. *Same—Demand.* Demand upon the officers of an irrigation district to make an assessment to pay interest on bonds is unnecessary, when by unreasonable delay they have lost the power to make the levy and the duty has devolved upon the county commissioners.—*Id.*..... 383
4. *To Railway Company—Operation of Line—Prior Demand—Disuse of Franchises.* Mandamus will lie to compel a street railway company to resume the operation of a line which it

MANDAMUS—CONTINUED.

- has discontinued without any prior demand for the performance of its duty to the public in that respect.—*State, ex rel. Grinsfelder v. Spokane St. Ry. Co.*..... 518
5. *Same.* Where a street railway company attempts to discontinue the operation of a line, after acquiring the right and commencing the performance of the service, its duty to continue the operation of the railway may be enforced by mandamus.—*Id.*..... 518
6. *Same—Parties.* A private individual who has bought considerable property near the end of a street railway line and has improved the property and made his residence there, relying upon the operation of the line, has such a material interest as to be a proper relator in proceedings by mandamus to enforce the performance of the railway company's public duty to operate its line.—*Id.*..... 518
7. *City Warrants—Non-Payment—Remedies.* Where warrants have been issued by a city, the proper remedy is not an action at law to recover the amount due thereon, but mandamus to compel their payment, even if the liability of the city is disputed on the ground they have been once paid or are forgeries, since Law 1895, p. 118, § 21 (Bal. Code, § 5760), permits the trial of disputed questions of fact in mandamus proceedings.—*Bacon v. Tacoma*.... 674
8. *City Warrants—Mandamus to Enforce Payment—Defenses.* The fact that a city has been enjoined from paying certain warrants cannot be set up as a defense to mandamus proceedings to compel payment by one who was not a party to the injunction suit.—*Savage v. Sternberg*..... 679
9. *Same—Parties.* In an action of mandamus by a warrant holder against a city treasurer to enforce payment of a warrant duly executed by the proper city officers, the city is not a necessary party defendant, as the presumption is that the claim evidenced by the warrant was properly audited and allowed.—*Id.*..... 679

See MUNICIPAL CORPORATIONS, 9.

MASTER AND SERVANT.

1. *Negligence of Master—Employment of Incompetent Servant.* The negligence of a coal company in employing an incompetent door tender, by reason of which injuries were sustained by a fellow servant, is established by evidence showing that the door tender was a boy fourteen and a half

MASTER AND SERVANT—CONTINUED.

years old; that his duty consisted, for thirteen hours a day, in opening a door in a dark mine gangway for approaching trains; that there was a heavy pressure of air against the door, which was increased whenever a train approached, rendering it difficult to open; that the boy had been employed but a short time, had once before failed to get the door open, had been complained against and his removal promised several days before the injuries occurred; that at the time of the accident he did not notice the approach of the train, though signalled by whistle, quickly enough to open the door; and that the engine crashed through the door, causing the injuries complained of to the plaintiff. —

Carlson v Wilkeson Coal & Coke Co...... 473

2. *Personal Injury—Fellow Servant.* A millwright employed to make repairs and alterations about a mill and a sawyer engaged in operating a saw therein are not fellow servants; and where the millwright, while employed in making alterations in the mill, above where the sawyer is at work, leaves a heavy chisel on a beam, from which it is j-rred by the vibration of the machinery, causing it to fall and injure the sawyer, the latter can recover from their common employer for the injuries sustained. — *Hammarberg v. St.*

Paul & Tacoma Lumber Co...... 537

3. *Injuries to Servant—Contributory Negligence—Electrical Appliances.* A lineman in the employ of a telephone company, among whose duties was the inspection of poles and wires, and who was equipped with apparatus for testing electric insulators, was chargeable with contributory negligence, as the direct cause of injuries received while climbing a pole used jointly by the telephone company and an electric railway, by reason of his coming in contact with a guy wire supporting a trolley wire, which had become highly charged with electricity, owing to the breaking of an insulator, when by the exercise of care on his part he could have learned of the danger. — *Anderson v. Inland Telephone & Telegraph Co.*..... 575

MORTGAGE.

1. *Foreclosure—Estoppel.* Where defendants in an action for the foreclosure of a mortgage are given the privilege of electing which one of two instruments given upon the same property to secure the same debt shall be foreclosed, they cannot raise the defense that the instrument chosen by them had been surrendered and canceled. — *Conklin v. Buckley.*..... 262

MORTGAGE—CONTINUED.

2. *Assignment.* Where suit has been instituted by an assignee to foreclose a mortgage which had been duly transferred to him, and the defendant, having been given an election between two instruments given for the same debt, chooses the one for foreclosure which had not been assigned, equity would look to the substance of the matter and treat the assignment as covering the mortgage so selected by the defendant. — *Id* 262
3. *Foreclosure—Sale by Parcels—Redemption.* Where mortgaged premises have been sold by the sheriff, on foreclosure in parcels, and the sale has been confirmed by the court, the mortgagee is entitled to redeem any parcel so sold separately by tendering the amount for which it was sold, together with interest on same and taxes and costs chargeable against said tract, under the provisions of Code Proc., § 504 (Bal. Code, § 5288), authorizing the sheriff to sell lots and parcels separately or together, as he shall deem most advantageous, and of § 512, allowing redemption of property sold subject to redemption, "or any part thereof separately sold." — *State, ex rel. Twiss v. Carpenter*..... 378
4. *Foreclosure—Deficiency Judgment—Pleading.* A deficiency judgment is warranted, upon foreclosure of a mortgage, when the prayer of the complaint asks for judgment against defendant for the sum secured, that the mortgage be foreclosed, the premises sold and the proceeds applied upon the mortgage, and for general relief. — *Rogers v. Turner*..... 399
5. *Same—Execution for Deficiency—Presumption.* Where a general execution has been issued upon a decree of foreclosure, it will be presumed, in the absence of proof to the contrary, that the mortgaged premises were duly sold and the special writ therefor returned. — *W. P. Fuller & Co. v. Hull* 400
6. *Validity—Mortgage Based on Conditions.* A covenant in a mortgage that in case the mortgaged premises should ever be alienated or abandoned for church purposes the mortgage debt should become due and payable is not void as being in restraint of alienation. — *Board of Church Erection Fund v. First Presbyterian Church*..... 455
7. *Same.* A covenant in a mortgage given by a Presbyterian church for money loaned from the erection fund of the General Assembly of that denomination, that the debt should become due if the church should cease to be connected with the General Assembly, is not a covenant contrary to public policy nor in restraint of religious belief. — *Id*..... 455

MORTGAGE—CONTINUED.

8. *Same — Debt Payable Contingently.* A mortgage is not void because the debt is made payable upon the happening of a contingency and no time for payment is mentioned in the mortgage. — *Id* 455
9. *Same — Right to Enforce Payment.* A covenant in a mortgage providing that in case the mortgaged premises be alienated or abandoned as a house of worship, except for the building or purchase of a better one, the mortgage should become due and subject to foreclosure, is broken by the mortgagor's allowing the property to be sold on execution and the church to be dispossessed of the premises by the issuance of a writ of assistance to the purchaser. — *Id*..... 455
10. *Assumption by Agent — Ratification.* Although a deed of mortgaged premises containing an assumption of the mortgage debt may have been taken by an agent of the grantees without their knowledge or consent, the action of the agent must be regarded as subsequently ratified, when it appears that the grantees afterwards made payments of interest on the debt and conveyed the premises by warranty deed, covenanting that they were the owners in fee simple. — *Ver Planck v. Lee*..... 492
11. *Upon Realty and Personalty — Sale as Entirety.* The general creditors of a corporation cannot complain that a decree in an action to foreclose a trust deed executed by the corporation, in which all the creditors were made parties, provided for sale as an entirety of all the property of the corporation, including personalty not covered by the trust deed, where no request for a separate sale of the personalty was made, and no appeal taken on that point by the party objecting. — *Manhattan Trust Co. v. Seattle Coal & Iron Co.*..... 493
12. *Foreclosure — Attorney' Fees.* Under Code Proc., § 803 (Bal. Code, § 5166), which provides that in all judgments on promissory notes, whether secured by mortgage or not an attorney's fee may be allowed in any amount specially contracted, the court has no power, upon rendering a decree of foreclosure, to fix the attorney's fee in any other amount than that contracted for. — *Vermont Loan & Trust Co. v. Greer*.... 611

See ATTORNEY AND CLIENT; FRAUD, 2; JUDGMENT, 8; PLEADING, 6; RECEIVERS, 1.

MUNICIPAL CORPORATIONS.

1. *Defective Streets — Liability for Injuries.* Where a street has been platted as part of a city and used by the pub-

MUNICIPAL CORPORATIONS—CONTINUED.

- lic as a highway, the city is liable for injuries received by a passenger thereon who without fault falls into an excavation made by the city in the street, although the city may have never assumed to improve the street, but has allowed it to remain in its natural condition, aside from excavations made therein for gravel to use elsewhere.—*Rowe v. Ballard* 1
2. *Penal Ordinances—Concurrent Legislation of State and City Respecting Penalties.* Where a state law merely prescribes the maximum penalty for the punishment of misdemeanors at a fine of \$500 or imprisonment for not more than one year and specifies no minimum penalty, a city ordinance fixing a minimum penalty of \$20 for the punishment of like offenses does not conflict with the constitutional provision that city charters shall be subject to the control of general laws, nor with the charter provision that punishment for violation of the penal ordinances of the city "shall in no case exceed the punishment provided for by the laws of the State of Washington for misdemeanors."—*Seattle v. Chin Let.* 38
3. *Same—Proceedings to Enforce—Prosecutions in Name of City.* Prosecutions for violation of municipal ordinances may be properly conducted in the name of the municipality, as the constitutional provision requiring all prosecutions to be conducted in the name of the state applies only to those instituted on account of the violation of the general laws of the state, and has no application to the infraction of municipal ordinances.—*Id.* 38
4. *Same—Police Power and Regulations.* Where a city is by its charter expressly authorized to provide by ordinance for the punishment of all practices dangerous to public safety or health and make all regulations necessary for the preservation of public morality within its limits, it is not restricted in defining offenses of that character to the exact scope of state laws upon like subjects.—*Id.* 38
5. *Warrants Drawn on Special Fund—Liability of City for Payment.* A city cannot be rendered liable generally upon warrants drawn against a special fund for the payment of a street improvement, even if the remedy of a street assessment proceeding is no longer available.—*Wilson v. Aberdeen* 89
6. *Warrants—Defenses Good Against Assignees.* Any defense that may be set up by a city against the original payee of its warrants is good as against his assignee.—*West Philadelphia Title & Trust Co. v. Olympia* 150

MUNICIPAL CORPORATIONS—CONTINUED.

7. *Street Improvements — Re-Assessments — Interest.* In making a re-assessment to cover the cost of a street improvement, the original assessment for which had been declared void, the city should, under Laws 1898, p. 229, § 6 (Bal. Code, § 1144), include in such new assessment the accrued interest upon the sums due for making such improvement. — *Philadelphia Mortgage & Trust Co. v. New Whatcom* 225
8. *Same* The failure of a city in making a re-assessment to provide a special fund to pay for a street improvement, to include accrued interest therein, will render the city liable for the amount of such interest, although the creditor against such fund may have taken no action to have the city include such interest in the re-assessment proceedings. — *Id.* 225
9. *Same — Remedy of Warrant Holder.* Where a city has provided a special fund by re-assessment proceedings to pay for the cost of a street improvement, owing to the invalidity of the original assessment, and make such re-assessment cover only the actual cost of the improvement without the accrued interest, mandamus will lie to compel the city to apply moneys in such special fund to the payment of the oldest outstanding warrant together with the accrued interest thereon, even though the fund will be exhausted thereby to the exclusion of some of the outstanding warrants. — *Id.* 225
10. *Negligent Construction of Streets — Liability of city.* Whether a city was negligent in the construction of a street is a question for the jury and their verdict will not be disturbed, when the evidence shows that the planking on the driveway of the street narrowed at a certain point from sixteen to eight feet in width, that the street at that place was elevated more than four feet, without a guard rail along the side, and that an ordinarily safe horse, accustomed to bicycles, became frightened at a bicycle while upon such portion of the street and backed over the side of the highway into the depression below, injuring one of the occupants of the buggy to which it was attached. — *White v. Ballard* 285
11. *Same — Contributory Negligence.* Where a horse is accustomed to bicycles and ordinarily under the control of the driver, it is not contributory negligence on his part to neglect to alight from his buggy and hold the horse's head upon meeting passing bicycles. — *Id.* 285
12. *Indebtedness — Bonds on Special Fund.* The issuance of bonds for the construction of a waterworks system payable

MUNICIPAL CORPORATIONS—CONTINUED.

- from a fund to be created from a certain percentage of the gross revenues of the system, would not create a debt against the city, although it might ultimately prove that the proportion of revenues from the system allowed for current expenses in its operation would be inadequate to fully meet such expenses.—*Faulkner v. Seattle*..... 320
13. *Same*. The fact that a special fund, which is to be provided for the construction of a system of waterworks, is not in existence, would not make expenditures incurred on the credit of that fund and which are provided as payable therefrom, an indebtedness against the city.—*Id.*..... 320
14. *Waterworks — Change of System — Elections*. The submission of a proposition to the voters of a city for an extensive addition to its system of waterworks and for a change from a pumping to a gravity system, is governed by Laws 1893, p. 12, § 2, which provides that a plan therefor may be submitted to the people and adopted by majority vote, if no indebtedness is created against the city; and such addition does not come within the purview of Laws 1895, p. 18 (Bal. Code, §§ 835-837), requiring a three-fifths vote in favor of a change of system, as the latter statute contemplates and governs changes in a system in process of construction.—*Id.*..... 320
15. *Charter Powers and Restrictions — Street Lighting Contracts*. Where a city is given power by its charter, without restriction, to provide for lighting the streets and furnishing the city with lights, a further provision of the charter fixing a method of levying an annual tax to pay for the same must be construed as an enlargement of the right of the city to provide funds therefor and not as a restriction upon the power conferred, which would confine the city's lighting contracts to annual periods.—*Townsend Gas & Electric Co. v. Port Townsend*..... 407
16. *Indebtedness — How Determined*.—In computing the indebtedness of a city to ascertain whether it comes within the 1½ per cent. limitation of taxable property, permitted by art 8, § 6 of the constitution, there should be deducted from the outstanding indebtedness the amount of cash on hand and the amount of uncollected current and delinquent taxes.—*Graham v. Spokane*..... 447
17. *Same*. Where a city has incurred a bonded indebtedness by a vote of its people, under the constitutional provision allowing cities by popular vote to incur such indebtedness in ex-

MUNICIPAL CORPORATIONS—CONTINUED.

- cess of $1\frac{1}{2}$ per cent. of its taxable property up to 5 per cent. thereof, such bonded indebtedness is not to be included in making computations of a city's indebtedness in order to ascertain whether it is in excess of the $1\frac{1}{2}$ per cent. limitation.— *Id* 447
18. *Powers — Contracts for Improvements — Trusts.* A contract between a city and a contractor for the construction of a public improvement, providing that the contractor should not be paid until all claims for labor performed and materials furnished had been adjusted, is valid, where a city is authorized to make contracts for such improvements, with no restriction on its power to surround its contracts with reasonable regulations, and constitutes the city a trustee for the benefit of such unpaid laborers and materialmen. — *State, ex rel. Bartelt v. Lieber*. 589
19. *Contracts for Improvements — Liability.* A city does not render itself liable out of its general fund for the payment of street improvement warrants drawn on a special fund, through its failure to provide such special fund. — *Rhode Island Mfg. & Trust Co. v. Spokane*. 616
20. *City Employes — Civil Service — Classification.* A flume tender, whose duty is the custody and care of the flume of a city water works system, and whose employment is of a permanent character is properly classified under civil service regulations in the official service instead of the labor service, when, under such regulations, official service comprises positions of a permanent character and labor service those of a temporary character. — *State, ex rel. Young v. Smith*. . . . 644
21. *Street Improvements — Notice to Property Owners.* Notice to a property owner of a proposed improvement of a street abutting on his land is not necessary, when the statutes and city charter authorize the city council to undertake such improvements upon the filing of a petition therefor by a majority of the abutting property owners. — *Jones v. Seattle*. 669
22. *Same—Assessments — Inclusion of Street Intersections.* A city is authorized to include the cost of that portion of a street improvement which is included in the limits of street intersections in the assessment against the property in the assessment district, as provided by Laws 1897, p. 316, authorizing cities to do so, if provision therefor is made by ordinance, when the city has so far complied with the statute as to pass an ordinance declaring that all street improvements shall be governed thereby in that respect, since 48—19 WASH.

MUNICIPAL CORPORATIONS—CONTINUED.

- such general ordinance must be construed together with the special ordinance authorizing the making of the improvement in question. — *Id.* 669
23. *Same* — *Contract to Lowest Bidder* — *Segregation of Improvement*. Under a law requiring the city council to let all contracts for street improvements to the lowest bidder, it is within the discretion of that body to call for bids for different portions of the work, if it appears to the council that the whole improvement can thereby be made at a less cost than by one letting. — *Id.* 669
24. *Same* — *Notice*. Notice to property owners of a proposed improvement, made by publication for fifteen days in the official newspaper of the city, is sufficient to bind them, when the city charter provides for such notice in such cases. — *Id.* 669
25. *Same* — *Issuance of Bonds for Improvement*. Notice by mail to an abutting property owner, as provided in Laws 1893, p. 231, § 1, sent by the city clerk thirty days before the issuance of bonds for the cost of a street improvement, in order to give him an opportunity to redeem from the assessment against his property, is sufficient. — *Id.* 669
26. *Same* — *Form of Bonds*. A charter requirement that an ordinance for the issuance of bonds to cover the cost of a street improvement shall prescribe their form and may provide that the entire issue shall be issued to the contractor, is sufficiently complied with, where a contract providing for delivering to the contractor the entire issue of bonds was made prior to the passage of the ordinance approving the assessment roll, and the bonds conformed to a general ordinance prescribing the form of all local improvement bonds, which was in force at the time the contract was entered into. — *Id.* 669
- See MANDAMUS, 7-9; RAILROADS, 4; TAXATION, 13; TIDE LANDS, 7.

NEGLECTANCE.

1. *Dangerous Premises* — *Contributory Negligence*. One who goes upon the land of another on a dark and stormy night, with knowledge of an exposed pit thereon, and is injured by falling into the pit, which was located at a point more than fifty feet from the customary path across the premises, is chargeable with such negligence as to bar recovery on his part. — *Anderson v. Northern Pacific Ry. Co.* 340

NEGLIGENCE—CONTINUED.

2. *Same — Action for Damages—Evidence.* Proof that plaintiff's intestate was found at the bottom of a pit five feet deep, on the morning following a dark and stormy night, severely injured (apparently by a fall), and unconscious, dying shortly after as a result of his injuries, and there was blood upon one of the stone walls of the pit, where his head had evidently struck, is sufficient, after verdict, to establish the fact that his death was caused by falling into the excavation.—*Id.*..... 340
3. *Same — Trespasser on Premises.* One who goes upon the land of another after notice to keep off, is a trespasser, regardless of the purpose for which the notice was given, as such notice is sufficient to rebut any presumption of license.—*Id.* 340

See MASTER AND SERVANT, 1-3; MUNICIPAL CORPORATIONS, 10, 11; RAILROADS, 1-3.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.**NEW TRIAL.**

1. *Parties Affected by Grant of.* The action of the court in granting a new trial must be held for the benefit of all the defendants, although applied for by but one of them, when it appears that the new trial was granted on the ground that the court had received the verdict in the absence of the parties, thereby constituting an irregularity in the proceedings of the court prejudicial to all the defendants.—*State, ex rel. Holgate v. Superior Court.*..... 114
2. *Imposition of Terms — Waiver of Costs.* Where a new trial is granted plaintiff, because of error of the court in ruling that his complaint does not state a cause of action, the plaintiff is entitled to the new trial unconditionally, and it is error to impose terms that his motion will be granted on condition of his filing a waiver of costs to date.—*Casey v. Malidore.*..... 279

NOTICE. See MUNICIPAL CORPORATIONS, 24, 25; TAXATION, 8.

OFFICE AND OFFICERS.

1. *Action to Try Title to Office — Abolishment of Office.* Where, pending the trial of an action involving the title to an office, the office is abolished, the action will be dismissed without determining the merits of the controversy.—*Lynde v. Dibble.*..... 328

OFFICE AND OFFICERS—CONTINUED.

2. *Abolishment of Office — Power of Legislature.* An act shortening a term of office, or abolishing an office, which had been created by the legislature, is not a violation of the constitutional provision that "the salary of any county, city, town or municipal officer shall not be increased or diminished after his election or during his term of office; nor shall the terms of any such officer be extended beyond the period for which he is elected or appointed." — *Bogue v. Seattle* 396

See MANDAMUS, 1; MUNICIPAL CORPORATIONS, 20;
STATES AND STATE OFFICERS, 1, 2.

PARTIES. See APPEAL, 14, 24, 38; MANDAMUS, 2, 6, 9.

PARTNERSHIP. See ATTACHMENT, 2, 3.

PENDENCY OF ACTION. See APPEAL, 16.

PENITENTIARY. See ACTIONS, 2.

PLEADING.

1. *Inconsistent Defenses.* A defendant may deny liability and at the same time plead a counterclaim or offset, without subjecting himself to the charge of pleading inconsistent defenses, if there is no direct contradiction in the special facts pleaded. — *Davis v. Seattle National Bank* 65
2. *Waiver of Objections.* The objection that plaintiff has commenced his action without leave of court first obtained, in cases where such leave is necessary, is waived, if not raised until after the joinder of issue. — *Nye v. Kelly* 73
3. *Insufficiency of Complaint — Motion to Make More Definite.* The objection that the complaint in an action by the assignee of a foreign administrator does not sufficiently plead the proceedings had in the probate court of another state should be urged in form of a motion to make the complaint more definite, and not by demurrer. — *Waldo v. Milroy* 156
4. *Demurrer — Scope of Admissions.* The fact that a demurrer admitted the averment that a dike had been constructed under the provisions of the invalid drainage law of 1890, instead of the invalid law of 1888, would not make the curative act in relation to void drainage proceedings applicable to the case at bar, since courts are powerless to grant relief which is not warranted by the statute invoked by the pleader. — *Franklin Savings Bank v. Moran* 200

PLEADING—CONTINUED.

5. *Bill of Particulars—When Grantable.* The defendant is not entitled to a bill of particulars when its only office would be to make plaintiff disclose the specific evidence upon which he relies for a recovery. — *Blackburn v. Washington Gold Mining Co* 361
6. *Foreclosure of Mortgage—Series of Notes—Stating Cause of Action.* In an action to foreclose a mortgage securing a series of notes it is not necessary to state a separate cause for each note, but they may all be properly set forth as one cause of action. — *Seattle Trust Co. v. Kerry* 389
7. *Judgment on Pleadings—Construction.* In an action upon a judgment of a court of record of a sister state, an answer alleging that the judgment had been obtained fraudulently by default, through personal service upon defendant while insane, and that there was a valid defense to the original action, states sufficient facts to constitute a defense, as against a motion for judgment on the pleadings, as pleadings are liberally construed upon such a motion. — *Townsend v. Price* 415
8. *Limitation of Actions—Personal Plea.* The defense of the statute of limitations is a personal privilege, and can be pleaded only by the person directly entitled to the benefit of it; it cannot be set up by other defendants in the action. — *Board of Church Erection Fund v. First Presbyterian Church*. 455
9. *Demurrer—Grounds Must be Specified.* A demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action will not permit the objection to be urged that the action is barred, as that question should be raised by demurrer on the ground that the action was not commenced within the time limited by law. — *Id.* 455
10. *Amendment—Discretion of Court.* An application by defendants to amend their answer so as to question the individual liability of one of them, made at the commencement of a second trial after the cause had been once tried and appealed on the same pleadings, is a matter peculiarly within the discretion of the superior court, and its action will not be disturbed in the absence of a showing of abuse of such discretion. — *Bishop v. Averill* 490
11. *Demurrer—Objections Not Raised.* A demurrer on the grounds that the complaint does not state a cause of action and that there is no equity in the complaint, would not raise the question of the legal capacity of plaintiff to sue. — *Birmingham v. Cheetham* 657

PLEADING—CONTINUED.

See APPEAL, 15, 17, 27, 37; EVIDENCE, 12; INTERPLEADER; JUDGMENT, 12; MORTGAGE, 4; RAILROADS, 1; TIDE LANDS, 3.

PRESCRIPTION. See TIDE LANDS, 4.

PRINCIPAL AND AGENT.

Scope of Agent's Authority—Implied Agency. The building of a logging road is not within the scope of authority delegated to an agent, who has been authorized to operate a shingle mill, contract for shingle bolts and conduct preliminary negotiations for rights of way and for the purchase of timber.—*Gregory v. Loose*. 599

See EVIDENCE, 14; LANDLORD AND TENANT, 3; MORTGAGE, 10; TRIAL, 6.

PROHIBITION, WRIT OF.

1. *Against School Director—Disqualification to Try Officer.* Where a board of education is by law constituted a tribunal, from which there is no appeal, for the trial of its school officers, a member of the board who has caused charges to be preferred against a school superintendent because of personal hostility toward him, and has announced a determination to vote against him, whatever the evidence, is disqualified to sit as a member of such tribunal during the trial of the superintendent and, if he attempts to participate as a member of the tribunal, may be restrained by the issuance of a writ of prohibition.—*State, ex rel. Barnard v. Board of Education*. 8
2. *To Superior Court—When Lies.* A writ of prohibition will not lie to restrain the superior court from canceling and vacating a notice of *lis pendens*, which had been filed by an appellant after taking an appeal from the judgment of said court, since the action of the court in such matter, is reviewable upon appeal.—*State, ex rel. Sligh v. Superior Court*. 118
3. *Same.—To Restrain Vacation of Judgment.* Prohibition will lie to restrain a court from vacating its own judgment on the ground of irregularity in that there is no proof of service of summons upon defendants of record, when the judgment itself contains a recital of due service and there is no showing in support of the motion to vacate that process had not in fact been served.—*State, ex rel. Boyle v. Superior Court*. 123

See APPEAL, 1.

PUBLIC LANDS. See TIDE LANDS.

PUBLIC POLICY. See MORTGAGE, 6, 7.

RAILROADS.

1. *Injuries to Stock—Absence of Fences—Pleading and Proof.* In an action against a railway company for killing stock, in which the only allegation of negligence set out in the complaint was the negligent operation of defendant's train upon its right of way, plaintiff cannot introduce proof that the right of way was not fenced, in order to establish negligence, under the rule that the evidence must correspond with the pleadings and be restricted to the issues.—*Dickey v. Northern Pacific Ry. Co.* 350
2. *Same—Presumption of Negligence—Rebuttal.* Under Laws 1893, p. 418 § 1 (Bal. Code, § 4332), providing that, in actions against railways for injuries to stock by collision with moving trains, the absence of fences is *prima facie* evidence of negligence, the fact that the track was unfenced would raise a mere presumption of negligence, which would be rebutted by proof that the train was running at a lawful rate of speed, equipped with the customary appliances, and that the stock when seen were so close that the train could not be stopped in time to avoid striking them.—*Id.* 350
3. *Same—Contributory Negligence.* One who turns a band of horses loose in a small field, fenced on all sides except the one adjoining a railway track, and takes no steps to prevent their getting in the way of passing trains, is guilty of such contributory negligence as to bar his recovery for injuries to his stock from a collision with a moving train.—*Id.* 350
4. *Injuries to Stock—Fences in Incorporated Towns.* That part of a railroad track within the limits of an incorporated town is not subject to the provisions of Laws 1893, p. 418, § 1 (Bal. Code, § 4332), making the failure of a railroad company to fence its track so as to turn stock *prima facie* evidence of negligence on its part in case of injury to stock by a moving train.—*Ryan v. Northern Pacific Ry. Co.* 533

RAPE.

Intent to Rape—Sufficiency of Information. An information charging defendant with an assault with intent to commit rape, made "on the 20th day of October, 1897, and within three years next before the filing of this information," by feloniously attempting to carnally know and abuse a female

RAPE—CONTINUED.

child under the age of eighteen years (the age of consent), is sufficient in its charges as to time and nature of the offense. — *State v. Smith*..... 376

See INDICTMENT AND INFORMATION, 3.

RECEIVERS.

1. *Appointment in Foreclosure Proceedings.* Under Laws 1869, p. 130, § 498, modifying the common law mortgage to a mere security, and giving (the mortgagee the right of possession till foreclosure sale, the statute of 1854 (Laws 1854, p. 162) authorizing the appointment of receivers in actions for the foreclosure of mortgages must be construed as repealed by implication. — *Norfor v. Busby*..... 450
2. *Priority of Claims — Supplies for Operation of Railroad.* A proceeding for the appointment of a receiver for a coal and iron company, which operated a short railroad line in connection with its mines, should not be treated as a railroad receivership so as to give precedence to claims for supplies furnished in the conduct of the business a few months prior to the receiver's appointment, as the essential element of a railroad receivership—the maintenance of the operation of the road for the benefit of the public—is lacking. — *Manhattan Trust Co. v. Seattle Coal & Iron Co.*..... 493
3. *Validity of Appointment — Collateral Attack.* Where a court having jurisdiction of the parties and the subject matter, appoints a receiver, the validity of the appointment cannot be challenged in a collateral action. — *Carroll v. Pacific National Bank*..... 639

See FRAUDULENT CONVEYANCES, 1, 2.

REFORM SCHOOL. See COURTS.

REPLEVIN.

1. *Right of Action for Goods Held for Freight Charges.* If a carrier has negligently delayed delivery of goods, or otherwise subjected itself to liability for damages in respect to the property carried, equal to or greater than the amount of the freight, the consignee may maintain replevin without a tender, and the claim for freight and the claim for damages may be adjudicated in the replevin suit. — *Moran Bros. Co. v. Northern Pacific R. R. Co* 266
2. *Action by Tenant in Common.* A tenant in common cannot maintain an independent action of replevin for the recovery

REPLEVIN—CONTINUED.

of grain raised by the tenants and in the possession of third persons.—*Vermont Loan & Trust Co. v. Cardin*..... 304

REVIEW, WRIT OF. See CERTIORARI; COSTS, 4.

ROBBERY.

Sufficiency of Information—Description of Property Taken. In an information charging robbery of money it is sufficient to describe the property taken as lawful money, without any further designation thereof, under Code Proc., § 1253 (Bal. Code, § 6859) which provides that in an indictment or information for larceny or embezzlement of money, it is sufficient to allege the larceny or embezzlement to be of money, without specifying the coin, number, denomination or kind thereof.—*State v. Johnson*..... 410

SALES.

1. *Assignment of Contract—Liability for Price.* The fact that persons obligated for the payment of the purchase price of standing timber under a contract with the owner of the land, subsequently incorporate and assign all their interest in the contract to the corporation, would not render the corporation liable for the purchase price, in the absence of a specific promise on its part to pay the land owner for the timber.—*Shepich v. Kent Lumber Co*..... 296
2. *Failure to Execute Contract—Prevention by Act of God.* In an action to recover the value of a quantity of oats which the owner had agreed, by executory contract, to sell plaintiff, the oats to be removed within a specified time, "wind, tide and other acts of God permitting," the plaintiff should be non-suited when it appears from the testimony that the plaintiff was prevented on but one occasion from removing the oats by the act of God, and there is no showing that the act of God intervened to prevent removal during the whole time of the life of the contract.—*Adams v. Ames*..... 425
3. *Conditional Sales—Bona Fide Purchasers.* Under Laws 1893, p. 253 (Bal. Code, § 4585), providing that all conditional sales of personal property, where the property is placed in the possession of the vendee, shall be absolute as to all creditors or purchasers in good faith, unless within ten days of the taking possession a memorandum of the sale stating its conditions be filed for record, a purchaser of such property in consideration of a pre-existing debt, is within

SALES—CONTINUED.

- the class of persons protected by the statute. — *Johnston v. Wood*. 441
4. *Delivery of Bill—Sufficiency of Evidence.* A finding by the jury that a bill of sale for certain personalty had been delivered to plaintiff is warranted, when the evidence shows that plaintiff and the owner of the goods had agreed on the sale in satisfaction of an existing indebtedness, but the bill had not been delivered because not acknowledged; that it was left with the owner, who agreed to have it acknowledged and also remarked that it would be in a certain drawer in his desk, if anything happened to him; that the owner absconded, and the plaintiff, on securing entrance to the owner's office, found a note advising him that the bill of sale was in the drawer as agreed upon, "and was hereby delivered to you"; and that the plaintiff went into possession of the property, and had surrendered to the former owner's attorney the evidences of indebtedness in consideration of which the sale had been made. — *Chezum v. Parker*. 645
5. *Rescission by Buyer.* The failure to rescind a fraudulent sale does not operate as a waiver of the right to treat the sale as fraudulent, but the defrauded buyer may affirm the contract and recoup in damages if sued by the vendor. — *Griffith v. Strand*. 636
6. *Same—Warranty of Seller.* The purchaser of a stock of goods cannot avoid the sale on the ground of fraud, in that false representations were made to him as to the quantity, quality and value of the goods, when there was no fiduciary relation between the parties, and when it was in the purchaser's power to readily determine the truth or falsity of such representations by an inspection of the goods. — *Id* . 636
7. *Same—Assignment of Seller's Rights—Estoppel Against Assignee.* One who stands by while fraudulent representations concerning certain goods are made is not bound thereby, though he subsequently by assignment acquires the interest of the one making the false representations, in the price of the goods, when such person at the time of the misrepresentations was not interested in the goods nor a party to the negotiations then pending, nor acting in collusion with his assignor, nor aiding in any attempt to defraud the purchaser of the goods, nor bound to take note of the misrepresentations by reason of his relation to the parties or interest in the subject matter of the sale. — *Id*. 636

SCHOOLS AND SCHOOL DISTRICTS. See CONSTITUTIONAL LAW, 1; PROHIBITION, WRIT OF, 1.

SHERIFFS AND CONSTABLES. See ATTACHMENT, 4.

STATES AND STATE OFFICERS.

1. *Removal of State Officers—Right to Hearing.* Under the constitutional provision that "all officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law," and under Laws 1893, p. 247 (Bal. Code, §§ 107-109) giving the governor power to remove any state officer appointed by him, whenever he shall be satisfied that such officer has been guilty of misconduct or malfeasance in office or is incompetent, the summary power of removal is vested in the governor without right in the officer removed to notice and a hearing, whether his term of office be for a fixed or for an indefinite period.—*State, ex rel. Howlett v. Cheetham.* 330
2. *State Treasurer—Additional Duties—Compensation.* The state treasurer is not entitled to compensation in addition to his salary for services in disposing of the securities deposited with him by a foreign insurance company as trustee for the policy holders, when the act imposing that duty on him makes no provision for additional compensation.—*Young v. Millett.* 486
3. *Contracts by Governor—Liability of State.* There being no constitutional or statutory provision, which, either expressly or by necessary implication, authorizes the governor to employ expert assistance for the purpose of investigating the books and accounts of the state penitentiary, the state is not bound by his contract employing an expert accountant for such purpose.—*Youny v. State.* 634
4. *Same—Ratification.* The fact that the legislature, subsequent to the making of an unauthorized contract by the governor, appropriates a smaller sum than the amount claimed, in payment of the services rendered under the contract, cannot be deemed a ratification, but amounts to no more than an adjustment and settlement of the claim by the legislature, thus withdrawing from the courts any jurisdiction to adjudicate upon the right to recover or the amount of recovery.—*Id.* 634

See ACTIONS, 1, 2; INJUNCTION; INTEREST.

STATUTES.

1. *Subject and Title of Statute.* An act which repeals an act authorizing municipal courts, but makes provision for their continuance until a certain date, is not objectionable as embracing more than one subject, since the subject of the act is the abolishment of the office [with a designation of the time when the act shall become effective; and the title, which declares that it is an act repealing the act establishing municipal courts and abolishing the courts and offices thereby created, is broad enough to cover the subject matter.—*Bogue v. Seattle*..... 396
2. *Same.* The subject of an act providing for the recording of conditional sales and leases of personal property in order to prevent their being treated as absolute as to creditors and purchasers in good faith, is sufficiently expressed in the title of the act, entitled "an act in relation to conditional sales and leases of personal property."—*Johnston v. Wood*... 441
3. *In Pari Materia—Repeal by Implication.* The act of March 9, 1893 (Laws 1893, p. 167), as amended by Laws 1895, p. 407 (Bal. Code, tit. 11, ch. 2), making provision for the assessment and collection of taxes in cities of the first class, being upon a special subject in regard to taxation, and the general revenue laws passed at the same session, are *in pari materia*, and must be construed together.—*Pierce County, ex rel. Maloney v. Spike*..... 652

See ATTACHMENT, 2.

STREET RAILWAYS.

1. *Duty to Continue Operation.* A street railway company which has occupied public highways for several years in the operation of its line without a grant or privilege or franchise from the municipality, cannot urge that objection for the purpose of relief against its enforced continuance to operate its line thereon, when its use and occupation of such highways has been disturbed.—*State, ex rel. Grinsfelder v. Spokane St. Ry. Co.*..... 518
2. *Same.* A street railway company which receives its franchises from the state and enters upon the enjoyment of them cannot cease to perform the functions which were the consideration for the grant of such franchises without the consent of the granting power.—*Id.*..... 518

See MANDAMUS, 4-6.

TAXATION.

1. *Action to Enforce—When Accrues.* The right of action for the collection of a tax does not accrue at the date the lien attaches, but from the date of delinquency. — *Pierce County v. Merrill*..... 175
2. *Same—Statutory Remedy.* An action will not lie for the collection of a tax on personal property, when the statute gives the treasurer the exclusive right to enforce the collection of the tax by distraint and sale of the property taxed. — *Id.*..... 175
3. *Delinquency Certificates—Inclusion of Penalties.* Under Laws 1897, p. 181, § 94 (Bal. Code, § 1749), providing for the issuance of delinquency certificates upon payment of taxes and interest against delinquent property, the treasurer is authorized to include as a portion of the payment necessary to secure the delinquency certificate such penalties authorized by prior laws as have attached and become a part of the taxes. — *Pickering v. Ball*..... 185
4. *Taxes Levied Under Unconstitutional Laws—Validity.* Dike and ditch taxes levied subsequent to the adoption of the state constitution by districts organized prior thereto are illegal and void, when the dike and drainage laws are in conflict with provisions of the constitution, since the effect of the adoption of the constitution was to abrogate and annul all territorial laws repugnant to it.—*Id.*..... 185
5. *Assessment—Correction After Filing.* After the assessor has returned his assessment and filed the lists and books with the clerk of the board of equalization, verified by his affidavit, as required by Laws 1897, p. 160, § 54 (Bal. Code, § 1710), he has no further power to make any corrections therein or addition thereto.—*Lewis v. Bishop*..... 312
6. *Same—Equalization.* Where a board of equalization, by formal order, has proceeded to raise an assessment from \$3,600 to \$18,000, they are estopped from claiming that the assessment as returned by the assessor was in fact \$18,000. *Id.*..... 312
7. *Same—Notice.* Under Laws 1897, p. 162, § 58 (Bal. Code, § 1714), a board of equalization has no power to increase the valuation of real property, unless at least five days' notice shall have been given in writing to the owner or agent. — *Id.*..... 312
8. *Same.* When the notice required by § 58, *supra*, is given by mail, the owner of real property affected by the proposed in-

TAXATION—CONTINUED.

- crease in valuation is entitled to ten days' notice, under Laws 1893, p. 414, § 21 (Bal. Code, § 4891), which provides that in case of service by mail the time of service shall be double that required in a case of personal service.—*Id.*..... 312
9. *Same.* Where the statute requires notice to a property owner of a proposed increase in the valuation of his property for taxation, an increase without notice is void, even though the conclusion of the board may be fair and in accordance with substantial justice.—*Id.*..... 312
10. *Fraudulent Assessment—When Court Will Interfere.* An erroneous assessment of property for taxation will not be interfered with by the courts, unless a substantial overvaluation is clearly established.—*Landes Estate Co. v. Clallam County* 570
11. *Same—Sufficiency of Evidence.* A finding of the court that an assessment of certain lands was fraudulent and excessive is warranted, when the evidence shows that the assessor informed the landowner that the valuation for the current year would be the same as the year before; that the land owner relied upon such statement; that the assessor in fact largely increased the valuation, which was not corrected by the board of equalization, owing to an oversight; that the landowner had no knowledge thereof until after the adjournment of the board of equalization; and that the real value of the land was the same as that placed upon it the year before.—*Id.*..... 570
12. *Action to Reduce Assessment—Tender.* One who brings an action to obtain a reduction in the amount of his assessment need only tender, under Code Proc., §§ 676, 677 (Bal. Code, §§ 5678, 5679), the sum averred in good faith to be justly due, and offer to pay any further sum that may be found due; and the finding in such case of a larger amount due by the court would affect only the question of costs.—*Id.*.. 570
13. *Board of Equalization—How Constituted for Cities of First Class.* Section 9, of the act of March 9, 1893, as amended by the act of March 21, 1895, (Laws 1895, p. 407, Bal. Code, § 1786), providing that, for the equalization of taxes in cities of the first class, a committee of three from the city council shall be selected to act with the county board of equalization, is not impliedly repealed by the general revenue law of 1897, which provides that the county commissioners shall constitute the board of equalization, since such provision is intended to be of general application and is in the

TAXATION—CONTINUED.

same terms as the like provision in the general revenue law of 1893, and must be construed together with the special laws as in *pari materia*, in the absence of an express repealing clause. — *Pierce County, ex rel. Maloney v. Spike* 652

See CERTIORARI, 1, 2; CONSTITUTIONAL LAW, 1; COUNTIES, 1; EQUITY; STATUTES, 3.

TENANCY IN COMMON.

Creation of Estate. A surrender of mortgaged community realty to the mortgagee by the father alone would not affect the title of the children in the share inherited by them from their mother, and could give the mortgagee no better title than that of a tenant in common with the children. — *Vermont Loan & Trust Co. v. Cardin* 304

See REPLEVIN, 2.

TENDER. See APPEAL, 17; CARRIERS; REPLEVIN, 1; TAXATION, 12.

TIDE LANDS.

1. *Right to Purchase—Conflicting Claims of Landlord and Tenant.* A tenant of tide lands holding under lease from the upland owner could not, in the absence of fraud, acquire a prior right of purchase, under Gen. Stat., § 2172, as against his landlord, by making improvements thereon prior to March 28, 1890, even though the lessor had never been in actual possession of the tide land, if the lessee had no other claim of title than his possession under the lease. — *Tullis v. Tacoma Land Co* 140
2. *Appeal from Decision of Commissioners.* Where an application for the purchase of tide lands is contested by two other claimants for separate parcels thereof, and all the applications are tried before the board as one proceeding and findings made against the original applicants, such applicant is entitled to bring the matter up for review before the superior court by one appeal as against both contestants, under laws 1897, p. 254, § 52 (Bal. Code, § 2182.) — *State, ex rel. Maylor v Superior Court* 198
3. *Right of Purchase—Contests—Pleading and Proof.* Under Laws 1895, pp. 554, 562, §§ 81, 82, providing that in contests before the board of land commissioners respecting the right to purchase tide lands, no formal pleadings are necessary, and that on appeal to the superior court the contest may be

TIDE LANDS—CONTINUED.

- tried upon the same pleadings unless ordered amended by the court, a judgment in another action, constituting *res judicata*, may be proven without being pleaded. — *Denny v. Northern Pacific Ry. Co.* 298
4. *Same — Title by Prescription.* Where one holding a government patent covering upland and tide land conveys a portion of the upland, it passes to the grantee littoral rights in the abutting tide land, and a possession of such abutting tide land by the grantee for more than twenty years, in connection with the state's disclaimer to patented lands, would constitute a perfect title in the grantee. — *Id.* 298
5. *Same — Rights of Tide Land Owner.* Under the provisions of the statute giving the upland owner the preference right of purchasing adjoining tide lands, no right is given the owner of a piece of tide land to come in as a preferred purchaser of abutting tide land. — *Id.* 298
6. *Applications to Purchase — Boundaries Recognized — Estoppel.* Where the boundaries of a disputed strip of tide land have been recognized for twenty-five years both by contract and the conduct of coterminous proprietors as appurtenant to a certain portion of the upland, and the authorities have plated the tide land in conformity with such lines, which have been adopted by the contestants in presenting their respective applications to purchase, the objection cannot be raised by the appellant that the disputed tide land, owing to the conformation of the shore, really abuts upon other lands than those of respondents. — *Id.* 298
7. *Extension of Streets Over — Limitation of Right — Constitutional Law.* The right given municipal corporations, by art. 15, § 3, of the state constitution, to extend their streets over tide lands to and across the harbor areas reserved for purposes of commerce and navigation is not a continuing one; and where a city, at the time of platting the tide lands by the state, exercises its right under said constitutional provision by filing a plat extending every alternate street across the tide land, it is precluded from thereafter exercising the right of extending the remaining streets across the intervening tide lands, except by condemnation and payment. — *State, ex rel. Gatzert-Schwabacher Land Co. v. Bridges.* 428
8. *Contract for Purchase — Extension of Time — Construction of Statute.* Laws 1897, p. 229, §§ 27, 28 (Bal. Code, §§ 2157, 2158) authorizing the extension of all contracts issued by the

TIDE LANDS—CONTINUED.

state "to purchasers of school or other lands," upon payment of delinquent and accruing interest, applies to contracts for tide lands as well as to those for granted lands, since § 5 (Bal. Code, § 2134) of the same act declares that "public lands" and "state lands" shall be deemed synonymous, whenever used in the act, and that all sorts of granted lands, school lands, university lands, tide lands, shore lands and harbor areas are included in the term "public lands." — *State, ex rel. Bellingham Bay Imp. Co. v. Bridges*.. 431

See **APPEAL**, 35; **HARBORS**.

TRESPASSER. See **NEGLECT**, 3.

TRIAL.

1. *Question for Jury—Contributory Negligence.* Whether a woman was chargeable with negligence contributing to injuries received by her in falling into a hole while walking along an unimproved street full of holes and stumps, on a dark night, without lantern or companion, when she might have gone around a longer way home by traveling upon improved sidewalks, was a question for the jury. — *Rowe v. Ballard*..... 1
2. *Same*— Whether plaintiff in such a case knew, or should be held to have known, of the existence of the excavation into which she fell, by reason of her residence at no great distance therefrom, is a question for the jury, when she testifies as to her ignorance thereof. — *Id.*..... 1
3. *Instructions—Matters in Issue.* Where evidence admitted in the trial of a cause has been subsequently stricken by the court on the ground that its relevancy had not been shown, it is error for the court to subsequently base an instruction upon the evidence as if it were still in the case. — *Nye v. Kelly*.. 73
4. *Right to Open and Close—Affirmative Defense.* In an action to recover on a promissory note the amount due with interest and a stated attorney fee fixed by the contract of the parties, which was entered into prior to the act of 1895 authorizing the court to allow such fee as may be reasonable, a defendant who admits the allegations of the complaint and sets up an affirmative defense that he signed as surety and has been released by an extension granted the principal maker, is entitled to the opening and closing of the case, as there is no burden upon plaintiff to prove even a reasonable attorney's fee. — *McDougall v. Walling*..... 80

TIDE LANDS—CONTINUED.

5. *Directing Verdict.* Where plaintiff's action is founded upon a written contract, whose construction is a matter of law for the court, the withdrawal of the case from the jury at the close of plaintiff's case and directing a verdict for defendant, there being no conflict in the testimony at that time, is in no sense a deprivation of the constitutional right of trial by jury.—*Creagh v. Equitable Life Assurance Society*..... 108
6. *Rejection of Evidence—Harmless Error.* Alleged error in the court's refusing to admit evidence as to an extension of time of payment granted by an agent was harmless, when there was no showing that the agent was authorized to bind his principal in that particular.—*Seattle Trust Co. v. Kerry*. 389
7. *Instructions—Harmless Error.* In an action upon a promissory note to which the defense of total failure of consideration has been interposed, a charge to the jury that their verdict should be for defendants, if they find that the consideration agreed on was, in contemplation of the parties, greater than the amount of the note, but unless they so find their verdict should be for plaintiff, is not prejudicial to plaintiff, when it is clear from the verdict that the jury found there was a total failure of consideration.—*Bay View Brewing Co. v. Tecklenberg*..... 469
8. *Exclusion of Evidence.* Where proffered evidence was properly excluded, a wrongful reason assigned therefor would not constitute error.—*Chezum v. Parker* 645
9. *Instructions—When Proper Under the Evidence.* A charge to jury that there must be mutuality in the fraudulent intent in order to render a bill of sale fraudulent as to other creditors is proper, when the evidence in the case shows that the sale in question was made as a preference of one creditor over others.—*Id* 645
10. *Improper Argument of Counsel.* A judgment will not be reversed on the ground of improper argument by counsel, unless it appears that counsel, against timely objection made, has abused the license of argument, and that prejudice has resulted therefrom to the opposing party.—*Id*..... 645

See APPEAL, 29, 31.

TRUSTS. See BANKS AND BANKING, 1; JUDGMENT, 11; MUNICIPAL CORPORATIONS, 18.

VENDOR AND PURCHASER.

Forfeiture—Recovery of Amount Paid. A receiver who, for want of an order of court, has never been in a position to make a conveyance of real estate to one to whom he has contracted to sell it, cannot claim a forfeiture of an installment of purchase money paid under an agreement for its forfeiture in case a second payment was not made within a given time, although no tender of the second installment has been made within the stipulated time. — *Bidwell a. Rice*..... 146

VENUE.

Orders Pending Action—Divorce Proceedings—Allowance of Alimony. The fact that a judicial district comprises several counties does not warrant the judge in trying an application for alimony pending a divorce proceeding, in any other county of his district than the one in which the suit was instituted, when there has been no change of venue granted. — *State, ex rel. Clark v. Neal*..... 642

WITNESSES.

Foreign Witnesses—Mileage. A witness from outside the state, who attends a trial for the purpose of testifying in the case, is entitled to mileage within the borders of the state. — *Carlson Bros. & Co. v. Van de Vanter* 32
See EVIDENCE, 1.

WORDS AND PHRASES.

"HEIRS." See DEATH BY WRONGFUL ACT.

WRIT AND PROCESS. See APPEAL, 19; CONTEMPT, 3; GARNISHMENT.

Ex. E.C.S.

4784 1104

HARVARD LIBRARY

